DOCKET

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 86-1415-CFX
Status: GRANTED

Docketed:
February 28, 1987

Title: Evelyn Marino, et al., Petitioners
v.
Juan U. Ortiz, et al.
and
Wayne Costello, et al.
v.
New York City Police Department, et al.

Court: United States Court of Appeals
for the Second Circuit

Counsel for petitioner: Podolsky,Ronald

Counsel for respondent: Dvorkin,Elizabeth, Koerner,Leonard J., Goodstein,Robert David, Kimerling,Kenneth, Walker,Richard K.

Entry	Date	Note	Proceedings and Orders
1	Feb 28 1987	G	Petition for writ of certiorari filed.
3	Mar 11 1987		Order extending time to file response to petition until April 24, 1987.
4	Mar 12 1987		The above extension applies to all respondents.
5	Apr 24 1987		Brief of respondents Juan Ortiz, et al. in opposition filed.
6	Apr 29 1987		DISTRIBUTED. May 14, 1987
7	Apr 29 1987	X	Reply brief of petitioners Evelyn Marino, et al. filed.
8	May 18 1987		Petition GRANTED.
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9	Jun 8 1987		The order entered May 18, 1987, granting the petition for writ of certiorari, is amended as follows:
10	Jun 8 1987		'The petition for a writ of certiorari is granted limited to Questions 2 and 3 presented by the petition.'
14	Jul 1 1987	G	Motion of Dov Hikind, et al. for leave to file a brief as amici curiae filed.
11	Jul 2 1987		Joint appendix filed.
12	Jul 2 1987		Brief of petitioners Evelyn Marino, et al. filed.
13	Jul 2 1987		Brief amicus curiae of United States (TBP) filed.
16	Jul 2 1987		Brief amicus curiae of United States filed.
15	Jul 6 1987	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
18	Jul 13 1987		Order extending time to file brief of respondent on the merits until August 22, 1987.
19	Jul 30 1987		Record filed.
20	Aug 11 1987		Record filed.
21	Aug 21 1987		Brief of respondent Guardians Assn. of New York filed.
30	Aug 21 1987	G	Motion of National League of Cities, et al. for leave to file a brief as amici curiae filed.
22	Aug 22 1987		Brief of respondent Sergeants Benevolent Assn. filed.
23	Aug 22 1987		Brief of respondent Hispanic Society, et al. filed.
24	Aug 22 1987	G	Motion of Lawyers' Committee for Civil Rights Under Law for leave to file a brief as amicus curiae filed.
25	Aug 22 1987		Brief amicus curiae of Birmingham, AL filed.

No. 86-1415-CFX

Entry	Date	Note	Proceedings and Orders
26	Aug 22 1987		Brief of respondents New York City, et al. filed.
29	Aug 22 1987	G	Motion of Equal Employment Advisory Council for leave to file a brief as amicus curiae filed.
27	Aug 26 1987		Motion of Dov Hikind, et al. for leave to file a brief as amici curiae GRANTED.
28	Aug 26 1987		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
31	Sep 21 1987		Motion of Lawyers' Committee for Civil Rights Under Law for leave to file a brief as amicus curiae GRANTED.
32	Sep 21 1987		Motion of Equal Employment Advisory Council for leave to file a brief as amicus curiae GRANTED.
33	Sep 21 1987		Motion of National League of Cities, et al. for leave to file a brief as amici curiae GRANTED.
34	Oct 9 1987		CIRCULATED.
35	Oct 9 1987		SET FOR ARGUMENT. Monday, November 30, 1987. (3rd case).
36	Oct 19 1987	X	Reply brief of petitioners Evelyn Marino, et al. filed.
37	Nov 10 1987	G	Motion of the Solicitor General to permit Glen D. Nager, Esquire, to present oral argument pro hac vice filed.
38	Nov 16 1987		Motion of the Solicitor General to permit Glen D. Nager, Esquire, to present oral argument pro hac vice GRANTED.
39	Nov 30 1987		ARGUED.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
FEB 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

86-1415

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

In re

EVELYN MARINO, et. al,
Petitioners,

v.

JUAN U. ORTIZ, et al,
Respondents

---

and

In re
WAYNE COSTELLO, et al,
Petitioners,

v.

THE NEW YORK CITY POLICE DEPARTMENT, et al.,
Respondents.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Ronald Podolsky, Esquire
Fifteen Park Row
New York, N. Y. 10038
---
(212) 460-8218

I. QUESTIONS PRESENTED FOR REVIEW

A. Is a Title VII discrimination suit settlement respecting a promotional examination to police sergeant sufficiently narrowly tailored, if majority candidates with a mark equivalent to or higher than the beneficiaries of the settlement as well as all others who passed have been promoted and hundreds of vacancies remain in the rank, if those majority candidates are excluded?

B. Is a civil rights action under 42 USC 1983 alleging violation of the Fourteenth Amendment Equal Protection of the Laws an impermissible collateral attack on a Title VII action when their action was instituted before the Title VII objector hearing and before the final order approving the settlement was

issued, when both actions were before the same judge, in the same court, at the same time with the same issues?

C. Are persons with an equivalent or higher grade on a competitive civil service examination than the beneficiaries of a theretofore promoted group of minority candidates in a Title VII settlement and who nonetheless are excluded from promotion consideration, required to intervene in the Title VII action pursuant to FRCP Rule 24, or must they be joined by the parties pursuant to FRCP Rule 19 and Rule 20?

II. PARTIES

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

In re

EVELYN MARINO, et. al,
Petitioners,

v.

JUAN U. ORTIZ, et al,
Respondents[1]

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and

In re

WAYNE COSTELLO, et al,
Petitioners,

v.

THE NEW YORK CITY POLICE DEPARTMENT, et al.,
Respondents.[2]

Petition for Writ of Certiorarito the United States Court of Appeals for the Second Circuit

(Full list of parties in footnotes)

Footnotes
1.

Caption: Marino et al v Ortiz et al.

EVELYN MARINO, ARTHUR J. ROTELLA, THOMAS RUSKIN, JOHN RUSSO, PATRICK RUSSO, BARNEY RYAN, THOMAS J. RYAN, MICHAEL RYDER, WARREN SAM, JOHN SASSANO, MEL SCHWARTZ, HERBERT SEIGAL, JAMES SMITH, ANN SOWINSKI, WILLIAM SPISAK, STANLEY TATAR, DENNIS TERMINELLO, JILL TOMCZAK, CHARLES TORANO, CATHERINE VOLPE, WALTER P. VOSS, ROBERT WAGNER, WILLIAM J. ZAZECKIE, THOMAS MOSS, THEODORE MCHUGH, JOSEPH NICOLOSI, KENNETH OTTEN, LOUIS PIOLI, TADGH D. MCNAMEE, TERRANCE MCCABE, DAVID PANETTA, CHRISTOPHER HAGGERTY, JAMES G. SCHNEIDER, THOMAS P. KELLY, FLORENCE CIAFFONE, KEVIN SWEENEY, HOWARD ALLEN, GARY BERMAN, STEVEN CAIRO, JOSEPH CONCANNON, MICHAEL CONOLLY, MAURICE DEVITO, ARTHUR FLYNN, RAYMOND GALLAGHER, KEVIN GRASSING, JAMES C. KELLY, KEVEN KUBICK, ROBERT B. LANGER, HENRY MAHNCKE, JOHN MARCONE, JOHN MAZZOCCHI, PATRICK MCGINNIS, SERGIO MIKULUS, KENNETH NILSEN, ALAN R. OSTOITS, HENRY PALAYO, ANTHONY REITANO, ROBERT A SOWINSKI, JOSEPH TORRAGROSA, RICHARD SEVERI, RUBIN RIVERA, ALAN MAY, MARC WOLF, WILLIAM SAUNIER, ANTHONY P. CONTENTO, DOMINICK PETRUCELLI, FREDERICK TERMINI, KEVIN RYAN, MORTON ADLER, RICHARD J. ANGLEY, ROBERT ALS, ALBERT ASCOLESE, POMPEO J. BASILE, LAWRENCE G. BLUMENTHAL, KEVIN BOSHELL. KEITH BRINKMANN, DANIEL BUCKLEY, JOHN J. CARNEY, JOSEPH CASELLA, HARVEY CHARYM, ROBERT CHILLE, GERALD CHIRICO, JOHN CONNOLLY, FRANK CORSELLI, GARY DAVIS, EDMOND J. DECIO, ALEXANDER A. DEFRANCIS,

NICHOLAS DIMURO, JAMES DONOHUE, WILLIAM ERDOGAN, NATHAN FISHMAN, PHILIP FRANCHINA, CLAIRE GALLAGHER, CARL GANDOLFO, JOHN P. GERRISH, DANIEL GRASSER, RONALD V. GRECO, GEOFFREY HART, JOHN HOLZE, RICHARD HOOVER, ROBERT IOVINO, JOHN JOHNSON, CRAIG JUDGE, KEVIN KAUFMAN, KIERAN KELLY, DANIEL KELLY, TIMOTHY KELLY. PATRICK J. KENNY, KEVIN KIRBY, FRAN KRIPINSKI, FRANK KIRBY, FRANCIS X. LAVELLE, ANTHONY LONGHITANO, JAMES LUONGO, DENNIS MC CABE, JOHN J. MCCANN, KEVIN L. MCDONALD, THOMAS MCDONALD, STANLEY MELTZER, RALPH MARCHITELLI, EVELYN MOONEY, GEORGE MORAN, JAMES MOREIN, KEVIN MULLEN, BRUCE MURPHY, MICHAEL D. NEMOYTEN, DANIEL P. O'NEILL, JOSEPH OPROMALLA, FRANK R. PAGANUCCI, EDMUND PEDERSON, JOSEPH PICARELLO, RONALD POLIS, GERALD POPE, ALAN PRESCOTT, ROBERT PYTEL, GERARD W. RODMAN, WILLIAM ROMANO, LOUIS ROSARIO, JOHN E RIVERS, GEORGE S. REYNOLDS, SAMUEL P. REIVER, EILEEN REGAN, ANGELO GRANIERO, ROBERT EDWARDS, THOMAS J. GULOTTA, RICKY KARPEN, KEVIN KEENAN, DAVID CHONG, WILLIAM DWYER, EDWARD HARVEY, MARY LONGWORTH, BENJAMIN CONFORTO, ANTHONY PAULINE, GARY M. KATZ, GEORGE J. MEYER, BARRY GOLDBLATT, ROBERT TOBUCK, FRANK BERGSTOL, JOSEPH BLANC, MARTIN CONNOLLY, LOUIS CURCURUTO, BERNARD WHALEN, VINCENT GIAMMUSSO, MICHAEL ARCARI, MICHAEL KELLY, HARVEY D. FEIT, JOHN ENGLISH, LOUIS GRECO, ROBERT LYNCH,WILLIAM CASEY, DAVID KAISER, THOMAS KELLY, RAYMOND DUFRESNE, ROBERT DEAN, JOHN MURPHY, JOHN FEENEY, JAMES MOOD, NICHOLAS LIMONCELLI, TODD FISHER, EDWARD SCOLAVINO, HAROLD

ROBINSON, BRIAN DAILY, EDWARD KULESA, A.P. CASANO, JOSEPH BROUSSEAU, RICHARD GWILLYM, JOHN NICKELS, RICHARD KLEINER, EDWARD PAROULEK, EDWARD W. SOLOMONIK, JOSEPH A. AVERSO, RONALD SHINDEL, HARVEY GRAPE, VINCENT J. GIANTASIO, PETER R. MALVASIO, MICHAEL A. GLASSER, ARTHUR PEASLEE, JOSEPH BUFFOLINO, MICHAEL TRIMIS, GEORGE KOEHLER, JOHN GEARY, DANIEL KORNBLUM, NICHOLAS BALZOMI, ANDREW FOPPIANO JAMES CURRY, LOUIS VINGELLI, WILLIAM M. BURYK, ANDREW SOVIA, JOSEPH K. MONAHAN, FRANCIS CUSH, WARREN MOLINO, JOSEPH J. GIACOPPO MICHAEL CAMPBELL, DANIEL COLLINS, JERRY WOJCIK, ROBERT TARIGO, ANGELA AMATO, GUY CASTELLANO, WILLIAM COYNE, LAURA DINAPOLI, MICHAEL A. GIACOPPI, HENRY GROSS, JOHN KLOEPPING, WILLIAM MCNAMARA, RANDALL MAYER, ROY W. POPPLE, JOHN SCOLARO, JOHN L. MELILLO, RONALD BRADLEY, DOUGLAS BRANDT,THOMAS MCGOVERN, ROBERT N. PETERS, ROBERT PEYER, ROBERT RENOLDS, EDWARD J. SMITH, NORMAN G. DONOGHUE, ROBERT TOOHEY, DONALD SKUZA, JERRY SALTZMAN, CHRISTINE LEGROTTAGLIE, DENNIS EMPEROR, JOSEPH STABILE, STEPHEN FAJFER, ROBERT WILLMARTH, GARY A. TIBALDI, JAMES A. CIACCIA, JOHN FITZGERALD, CHRISTOPHER T. BUCKLEY, RONALD BETTERLY, ARTHUR KAPLAN, EDWARD F. BRAJCZEWSKI, JOHN YUNKNES, BRIAN HOGAN, FRANK PANARESE, JOHN GURTOWSKI, DIANNE BROCCOLI, ANTHONY LOMBARDO, PAUL CALANDRO, WILLIAM KINZLER, JAMES CHRISTOPHER, JR., NICHOLAS R. BATTISTA, WILLIAM SEYCHELL, WILLIAM DUNPHY, TIMOTHY CONNOLLY, JOSEPH PASTORINO, MICHAEL MCGOVERN, THOMAS HATCH, ROLAND CAPUANO, DOMENICK CANALE, THOMAS CALLAHAN,

THEODORE WESS, STEPHEN KURZ, EDITH LINN, DARRYL BERGER, KARL GABRIELSEN, CONNIE PHELAN, THOMAS IACOPELLI, JAMES MARTIN, FRANK MANDILE, MARY MARUFFI, JAMES O'REILLY, GILBERT EATON, THOMAS KENNEDY, ELLEN HALE, DANIEL BOYLAN, RICHARD MILTENBERG, KEVIN O'KEEFE, ROBIN BIRNBAUM, FRANK FORTE, MICHAEL PASQUALE, MARTIN RODDINI, ANTHONY CELANO, CHARLES MARTIN, SALVATORE BUSCEMI, ROBERT AHERN, STEPHEN BRODY, CHRIS ATHANASOPOULOS, BILLIE RIVERA, KAREN RUBINO, MICHAEL DEMARFIO, RAYMOND MARDINEY, JOHN HOLUB, JOHN TOLEDO, JOHN WYNNE, MICHAEL FISCINA, ROBERT SPITZER, KENNETH ROBERTS, ROBERT CLANCY, ROBERT NAPOLITANO, LEE POJE,

Petitioners

v.

JUAN U. ORTIZ, PERSONNEL DIRECTOR OF THE CITY OF NEW YORK, BENJAMIN WARD, POLICE COMMISSIONER OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,

Respondents

BEST AVAILABLE COPY

~~WAYNE COSTELLO,~~ JOHN LANIGAN, ~~BARBARA~~ PICHLER, CHIRISTOPHER ~~MATEJOV~~, ALAN FISHER, RON ~~MAZONE~~, THOMAS COLLINS,

Footnotes
2.

Caption: Costello et al v The New York City Police Department, et al.

WAYNE COSTELLO, JOHN LANIGAN, BARBARA PICHLER, CHIRISTOPHER MATEJOV, ALAN FISHER, RON MAZONE, THOMAS COLLINS, THOMAS MCMANUS, WILLIAM LUCAS, MARY DONNELLY, GENNARO J. AIELLO, ANTHONY M. LOMBARDO, JOHN GALVIN, PHILLIP MCNERNEY, JAMES MURANELLI, RICHARD WOJNO, GULIANO SCHIOZZI, THOMAS E. QUINN, DENNIS CASAVILLO, CHARLES HART, DAVID VERAJA, JOHN HOUSTON, PATRICK CASTORO, JAMES COLLINS, LAWRENCE PRAINO, MICHAEL SIEDEL, RICHARD FRICK, JAMES HEALY, FRANK GAETANI, JAMES LIEN MARK EISENBERG, WILLIAM MOEN, WILSON PADILLA, EVELYN MARINO, ARTHUR J. ROTELLA, THOMAS RUSKIN, JOHN RUSSO, PATRICK RUSSO, BARNEY RYAN, THOMAS J. RYAN, MICHAEL RYDER, WARREN SAM, JOHN SASSANO, MEL SCHWARTZ, HERBERT SEIGAL, JAMES SMITH, ANN SOWINSKI, WILLIAM SPISAK, STANLEY TATAR, DENNIS TERMINELLO, JILL TOMCZAK, CHARLES TORANO, CATHERINE VOLPE, WALTER P. VOSS, ROBERT WAGNER, WILLIAM J. ZAZECKIE, THOMAS MOSS, THEODORE MCHUGH, JOSEPH NICOLOSI, KENNETH OTTEN, LOUIS PIOLI, TADGH D. MCNAMEE, TERRANCE MCCABE, DAVID PANETTA, CHRISTOPHER HAGGERTY, JAMES G. SCHNEIDER, THOMAS P. KELLY, FLORENCE CIAFFONE, KEVIN SWEENEY, HOWARD ALLEN, GARY BERMAN, STEVEN CAIRO, JOSEPH CONCANNON, MICHAEL CONOLLY, MAURICE DEVITO, ARTHUR FLYNN, RAYMOND GALLAGHER, KEVIN GRASSING, JAMES C. KELLY, KEVEN KUBICK, ROBERT B. LANGER, HENRY MAHNCKE, JOHN MARCONE, JOHN MAZZOCCHI, PATRICK

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Petitioners

v.

THE NEW YORK CITY POLICE DEPARTMENT, AND DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK, THE HISPANIC SOCIETY OF THE NEW YORK CITY POLICE DEPARTMENT, INC., LUIS A. SALGADO, WILLIAM MORALES, MANUEL TORRES, VALENTIN NEVES JR. INDIVIDUALLY AND IN BEHALF OF ALL THOSE SIMILARLY SITUATED, THE GUARDIAN ASSOCIATION OF THE POLICE DEPARTMENT OF THE CITY OF NEW YORK, INC., GREGORY S. WILLIAMS, ROBERT. MCNAIR, TIMOTHY PEARSON, INDIVIDUALLY AND IN BEHALF OF ALL THOSE SIMILARLY SITUATED, THE CITY OF NEW YORK, FRANCIS SHIELDS, MICHAEL WARD, MELENE RINALDI, FERDINAND GUERRA AND PETER MAHON, AS PRESIDENT OF THE SERGEANTS BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, DOUGLAS ALMSKOG, ANTHONY RICHIE, RONALD SMITH, SUSAN FOX AND ROBERT DEMAR, ROBERT HYMAN, DENNIS GALLAGHER, THOMAS BISCIONE, TIMOTHY MCCARTHY, DONALD KINDRUP, EMRALD SOCIETY OF THE POLICE DEPARTMENT OF THE CITY OF NEW YORK, INC., COLUMBIA ASSICIATION OF THE POLICE DEPARTMENT OF THE CITY OF NEW YORK, INC., SHOMRIN SOCIETY OF THE NEW YORK CITY POLICE DEPARTMENT, INC., ST. PAUL SOCIETY OF THE CITY OF NEW YORK POLICE DEPARTMENT, INC., AND STEUBIN ASSOCIATION OF THE POLICE DEPARTMENT OF THE CITY OF NEW YORK,

Respondents.

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I. QUESTIONS PRESENTED FOR REVIEW

A. Is a Title VII discrimination suit settlement respecting a promotional examination to police sergeant sufficiently narrowly tailored, or is it violative of the Fourtheenth Amendment equal protection clause when candidates with a mark equivalent to or higher than the minority member beneficiaries of the settlement, against whom they competed, are excluded from the list of eligibles, when all persons who passed the examnation in the first instance have been promoted as have those beneficiaries of the settlement, and no new examination has been given and hundreds of vacancies in the rank still remain?

1

B. Is a civil rights action under 42 USC 1983 alleging violation of the Fourteenth Amendment equal protection of she laws clause brought by persons with a grade equivalent to or higher than minority police officers who had theretofore been promoted to police sergeant pursuant to a Title VII interim order, which action was instituted before the notice of the Title VII objector hearing was published, and before the final order approving the settlement was issued, and both of which actions were before the same judge, in the same court, at the same time with the same issues, an impermissible collateral attack on the Title VII proceeding which might lead to inconsistent results, thereby justifying dismissal of that 42 USC 1983 action?

1

C. Are persons with an equivalent or higher grade on a competitive civil service examination than the beneficiaries of a theretofore promoted group of minority candidates in a Title VII settlement and who nonetheless are excluded from promotion consideration, required to intervene in the Title VII action pursuant to FRCP Rule 24, or must they be joined by the parties pursuant to FRCP Rule 19
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Chase National Bank v Norwalk, 291 U.S 431 (1934) **25**

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Corley v Jackson Police Department, 755 F.2d 1207 (5th Cir. 1985) **23**

Dennison v City of Los Angeles Dep't of Water & Power, 658 F2d 964 (9th Cir. 1981) **23**

English v Seaboard Coast Ry., 465 F.2d43, (5th Cir. 1972) **26**

Local No. 93, International Asociation of Firefighters, v City of Cleveland, U.S. (No. 84-:999 (July 2, 1986) **30**

O'Burn v Shapp, 770 F.R.D. 549 (E.D.Pa.), aff'd mem. 546 F.2d 417 (3d Cir. 1976) cert den.430 U.S. 968 (1977) **22**

Prate v Freedman, 430 F.Supp 1373,(W.D.N.Y.) aff'd mem., 573 F.2d 1295 (2d Cir 1977). cert den. 436 U.S. 922 (1978) **22**

Reeves v Wilkes, 754 F.2d 965 (11th Cir. 1985) **23**

Taggard v City of Jackson, 367 F.2d 66(5th Cir. 1982), cert denied sub nom. **Ashley v City of Jackson,** 464 U.S. 900 (1983) **22**

United States v Jefferson County, 720 F.2d 1511 (11th Cir. 1983 **23**

W.R. Grace & Co. v Rubber Workers, 461 U.S. 757 (1983 **26**

Constitutional and Statutory Provisions

New York Constitution Art V Sec. 6 **21,30**

Federal Rules of Civil Procedure
Rule 19 **26,32**

Rule 24 **26**

IV. OPINIONS BELOW

Marino, et al v. Ortiz et al., F.2d (No. 86-7347, 2d Cir. December 8, 1986) is reproduced at A1-A12. It affirmed the dismissal by the district court memorandum endorsement, of Carter, USDJ, United States District Court, Southern District of New York, Docket No. 985 Civ. 60068 (RLC) n.o.r., reproduced at A57.

Hispanic Society of the New York City Police Department Inc., et al. v The Police Department of the City of New York, et al., F.2d (No.86-7507, 2d Cir. December 8, 1986) is reproduced at A58-A79. It dismissed the appeal from the order of the District Court, Carter, USDJ, United States District Court, Southern District of New York, Docket No. 84 Civ. 6628 (RLC), F.Supp (SDNY 1968), 40 Empl. Prac. Dec (CCH) 36385 (SDNY 1986) reproduced at A80-A99.

V. JURISDICTIONAL STATEMENT

In **Marino et al v Ortiz et al** the Court of Appeals for the Second Circuit by decision dated December 8, 1986, affirmed the dismissal of the complaint by the district court, as an impermissible collateral attack on the proposed settlement of the companion **Hispanic Society** case.

In **Hispanic Society of the New York City Police Department et al. v The Police Department of the City of New York, et al,** the Court of Appeals by decision dated December 8, 1986, dismissed the complaint of the Costello petitioners herein, on the grounds that they had no standing to appeal as objectors to a Title VII employment settlement, since they had never formally intervened in the case.

The petition for certiorari joins both companion cases under rule 19.4 of this Court. It is a petition for writ of certiorari to the 2d Circuit Court of Appeals relating to a civil matter and is filed within 90 days, the time prescribed by Rule 20.2 of this Court. Jurisdiction pursuant to28 U.S. C. 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS

New York Constitution Art V. Sec. 6. Appointments and promotions in the civil service of the state and all civil divisions thereof, including cities and villages shall be made according to merit and fitness to be ascertained, as far as in practicable by examination which, as far as practicable, shall be competitive...

Federal Rules of Civil Procedure:

Rule 19(a) PERSONS TO BE JOINED IF FEASIBLE: A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (1) as a practical matter impair or impede his ability to protect that interest or (ii)

leave any of the persons already parties subject to a substantial risk of incurring double multiple or otherwise inconsisten- obligations by reason of his claimed interest. If he has not been joined, the court shall order that he be made a party....

Rule 24(a) INTERVENTION OF RIGHT. Upon timely application any one shall be permitted to intervene in an action; (1) when a statute of the United States confers an unconditional right to intervene' or (2) when the applicant claims an interest relating to the property or transaction which is the subjec t of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interet is adequately represented by existing parties.

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VIII. STATEMENT OF THE CASES

In 1984, the Hispanic Society and the Guardians Association, two ethnic societies representing Hispanic and black police officers respectively instituted Title VII suits in the Southern District of New York, against the New York City Police Department and other city defendants, alleging that the sergant's examination which they failed was racially discriminatory. The cases were assigned to Judge Carter. (A3-A4)

During the course of the consolidated cases, various groups representing line organizatins and persons awaiting promotion on the list and white enthnic socienties were permitted to intervene. (A4). On November 27, 1985 the balance of the eligible list plus a certain number of

black and Hispanic candidates previously perceived to have failed the examination were also promoted, pursuant to an interim order of the court permitting such promotions. (A6) After these promotions there still remained over 400 vacancies in the rank, the list was exhausted and no new examination had been given for the position (A86, A103).

On December 30, 1985 the Marino petitioners instituted a lawsuit pursuant to 42 USC 1983 alleging that they were police officers who had competed in the said sergeant promotion examination and had scored a grade equivalent to or higher than the scores of the minority members theretofore promoted, and that they they thereby were being deprived of equal protection of the laws guaranteed under the 14th amendment.(14-A29). The

suit was assigned to Judge Carter who also was the judge in the Hispanic case.

On February 5, 1986 the municipal defendants in **Marino** filed a motion to dismiss the case alleging that it was an impermissible collateral attack on the proposed settlement **Hispanic** settlement. (A30-A38) On February 7, 1986 the proposed settlement upon which the November 27, 1985 interim promotions been based was submitted to the district court and was agreed to by all parties except the intervening white ethnic societies.(A89) and he conditionally approved it, setting time strictures for objections to be filed.

The Costello petitioners herein, who included all plaintiffs in the **Marino** litigation together timely filed a written objection to the settlement by

the same attorney who represented plaintiffs in **Marino.** On April 17, 1976 the objection hearing took place.(A64, A68-70, A100-A106). On April 25, 1986, the motion dismissing the **Marino** complaint was granted (A13). On June 16, 1986 the settlement was approved, disallowing the claims of the Costello objectors. (A80-A99). Timely appeals to the Second Circuit resulted in affirmance of the **Marino** dismissal as an impermissible collateral attack on **Hispanic** and the Costello appeal in **Hispanic** was dismissed because they did not formally intervene. (A1, A11-A12), (A77-A78). Both decisions were dated December 8, 1986. The issues of whether **Marino** was an impermissible collateral attack under these circumstances, and whether the Costello Petitioners were

required under the concept of mandatory intervention to formally interevene or whether they should have been joined as parties by the existing litigators thereby are sought to be resolved by the peition. The jurisdiction of the District Court in **Marino** was 42 U.S.C. 1983, the 5th and 14th Amendments to the United States Constitution and 18 U.S.C. 1353.(A14). In **Hispanic** jurisdiction had been founded on Title VII of the Civil Rights Act of 1964, 42 U.S..C. 2000e-2 et seq. (A58).

IX. REASONS FOR GRANTING THE WRIT

The Court of Appeals at the outset of its opinion recognized that it was called upon to determine what constitutes a collateral attack on a consent decree(A1). In holding the **Marino** litigation was an impermissible collateral attack, it observed that:

> Admittedly, Judge Carter had not given final approval to the consent decree in **Hispanic Society** at the time he dismissed the lawsuit, yet, the **Hispanic Society** litigation had proceeded to a very significant stage, a basic settlement had been reached and an interim order that matched the terms of the ultimate consent decree had been filed. A hearing had been scheduled to determine whether the proposed settlement was reasonable, fair and adequate. Had appellants been allowed to maintain this lawsuit under these circumstances, the parties' incentive to pursue the **Hispanic Society** settlement would have been seriously eroded; the settlement would have had no

utility if it failed to prevent further litigation of the matter. Furthermore, since even the later actual entry of the consent decree would not have decided the issue, the concept of final judgment would have been undermined. By the same token, this lawsuit would have relitigated the propriety of the settlement, thus inviting conflicting results. That appellants' complaint was before the sme judge who was presiding in **Hispanic Society** does not change the result. See: **Black and White Children of the Pontiac School System v School Dist't,** 464 F.2d 1030 (6th Cir. 1972) (per curiam). There could be no certainty that the two proceeding would continue in parallel fashion. Thus judge Carter was correct in deeming this suit an impermissible collateral attack on a consent decree. Appellants proper of course, as in most cases where collateral attacks have been dismissed would have been to intervene in the lawsuit. from which the consent decree issued ... (A10-A12)

A writ of certiorari should be granted so that this court may resolve the issue of what constitutes a

collateral attack. A ruling is required to determine if a lawsuit by pesons aggrieved by the promotion by interim order of beneficiaries of a proposed settlement who bring a lawsuit based on equal protection of the laws, which suit is before the same judge, in the same court, at the same time and before judgment approving the settlement is a collateral attack. The concerns expressed by the circuit court that such a lawsuit would cause the undermining of initiatives or lead to other possible discomfitures of the parties, while the suggested course of intervention would have not have such concerns, and that a trial judge having the two cases before him at the same time in the same forum would reach an inconsistent result with himself should be laid to rest by this

court. The **Marino** litigation was not a collateral attack on an existing judgment because, being before the same judge it was not collateral, and being before judgment it was not an attack.

The Marino and Costello petitioners were not remote to the definition of "New York City Defendants" who were to be bound by the proposed settlement (A68-A69) in that they are police officers who took the same promotional examination as did the beneficiaries of the settlement and outscored them. Under **New York Constitution** Art V Sec. 6, promotions are to be made, insofar as is practicable by competitive examination. Thus there is defined the equal protection of the laws which are due under the circumstances.

It is a matter of national

importance that this court define the proper procedure under the circumstnces wherein majority civil employees are faced with racially oriented remedies agreed to by their minority collegues and the municipal employer. The circuit court below has ruled that intervention by the aggrieved persons is the only course open to litigate the issue. This is known as the mandatory intervention system endorsed by such cases as **Taggard v City of Jackson,** 367 F.2d 66 (5th Cir. 1982), cert denied sub nom **Ashley v City of Jackson,** 464 U.S. 900 (1983); **O'Burn v Shapp,** 770 F.R.D. 549 (E.D. Pa.), aff'd mem. 546 F.2d 417 (3d Cir. 1976) cert denied 430 U.S. 968 (1977); **Prate v Freedman,** 430 **F.Supp 1373, 1375 (W.D.N.Y.) aff'd mem., 573 F.2d 1295 (2d Cir 1977, cert denied 436 U.S. 922**

(1978); Dennison v City of Los Angeles Dep's of Water & Power,658 F2d 964 (9th Cir 1981). The concept of mandatory intervention has been criticized by Rehnquist, J, joined by Brennen, J., dissenting from denial of certiorari in **Ashley v City of Jackson,** and has been rejected in **United States v Jefferson County,** 720 F.2d 1511, 1518 ' n.20 (11th Cir. 1983); **Reeves v Wilkes,** 754 F.2d 965,969-72 (11th Cir. 1985). The 5th Circuit, has indicated a pressing need for guidance from this court in **Corley v Jackson Police Department,** 755 F.2d 1207 (5th Cir. 1985) expressed second thoughts about mandatory intervention when it observed at 1210:

> [If] well settled intervention rules in combination with the rule of **Thaggard v City of Jackson** to which we are firmly bound here,

> unjustly deny a party his day in court, then the appropriate remedy lies in reexamination of the **Thaggard** doctrine in the appropriate forum, particularly in light of the persuasive opinion of Justice Rehnquist, joined in by Justice Brennen dissenting from the denial of certiorari in **Thaggard** ...

It should be observed that the 2d Circuit dismissed the Costello petitioner's appeal on the grounds of mandatory intervention (A77) and affirmed the district court's dismissal of the Marino petitioners' equal protection complaint on the grounds that it was an impermissable collateral attack (A12). Petitioners were thus unjustly denied their day in court. Adhereance to the discredited doctrine has led to the torchered logic below by the curious holding that the Marino petitioners posed the danger of an inconsistent result by a

judge hearing both cases before judgment at the same time. The court observed that any denial of a motion to intervene could be appealed. (A12). Thus, as is often the case where illogical rules prevail, procedure supplants substance for resolving constitutional issues.

Mandatory intervention has been disapproved by this court. The law does not impose upon any person entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger.**Chase National Bank v Norwalk,** 291 U.S. 431, 441 (1934). Since the petitioners presumably are to be bound by the judgment of the district court, and are identifiable as nonminority employees who outscored the beneificiaries of the settlement in the same examination, the due process doctrines embraced in Rules

19 (a) (2) and Rule 20, FRCP, have far more constitutional strength than does the mandatory intervention doctrine which is a strained interpretation of Rule 24 FRCP relied on by the 2d Circuit below (A75). Moreover some courts have ordered the necessary joinder of persons under rule 19(a) when the relief sought in the original action would conflict with their rights. See e.g. **English v Seaboard Coast Ry.,** 465 F.2d 43, 46-48 (5th Cir. 1972); **Bremer v St Louis S.R.R.,** 310 F.Supp 1333,1339-40 (E.D. Mo 1969). Analogous situations have been addressed by this Court. See for example: **W.R. Grace & Co. v Rubber Workers,** 461 U.S. 757, 771 (1983), citing **Alexander v Garnder-Denver Co.,** 415 U.S., at 44. Just as an employer and the EEOC by a Title VII conciliation agreement cannot

alter an existing collective bargaining agreement with a union without its consent, or be bound without a judicial determination in which the union joined as a party, the public employer and some of its ethnic societies cannot alter the constitutional rights of the petitioners who outcompeted the beneficiaries of the settlement without compulsatory joinder.

The courts have strugggled to find the proper role for majority employees in employment discrimination lawsuits brought by their minority colleagues. Here the two lawsuits were before the same court, the same judge, at the same time and with the same issues. It would seem seasonal for this court to develope a more precise understanding of majority employee's substantive interests in order to tailor the procedural role which

majority employees should play. The mandatory joinder of those affected by employment of race conscious remedies is more in comportment with due process of law than is the mandatory intervention concept. The conflict between circuits and the disarray caused by inconsistent rules of procedure invite intervention by this court.

The procedural devices employed below have left in place a situation wherein the petitioners have been stripped of their constitutional rights to competitive examination promotion. This is the first public employment Title VII case wherein at the time of the race conscious remedy, all persons who passed the examination had been promoted, all persons alleged to have been discriminated against had been promoted,

no new examination had been given, the existing list had been exhausted, no new list had been promulgated because no new examination had been given, and over 400 vacancies had still existed in the rank, with 30 to 60 vacancies accruing each month. Petitioners, under these circumstances should not have been excluded from promotional opportunity to these existing and accruing vacancies by reason of their race. This was not an entry level position. To be narrowly tailored under these circumstances could have meant to prefer in a time sense the minorities, but in no event was it essential to employ the settlement as a racial exclusionary device against the petitioners.

The **Marino** complaint (A14, 19-22) falls squarely within the observations

expressed by this Court in **Local Number 93, International Asociation of Firefighters, v City of Cleveland,** U.S. (No. 84-:999 (July 2, 1986).

> This is not to say that the parties may agree to take action that conflicts with or violates the statute upon which the complaint was based. As noted above, the fact that the parties have consented to the relief contained in a decree does not render their action immune from attack on the ground that it violates Sec. 703 of Title VII or the Fourteenth Amendment.

The Marino and Costello petitioners were defined as parties and as defendants in the settlement, and presumably bound in a due process sense by its terms. They did not consent to the order as presented to the court. It imposed an unnecessary obligation upon them to totally subordinate their right under **New York Constitution,** Art. V Sec. 6 to be

certified and considered for promotion, an action which was not necessary under the circumstances of this case.

Justice O'connor in a concurring opinion in the same case specifically observed that:

> Even if nonminority employees do not object to the consent decree, a court should not approve a consent decree that on its face provides for racially preferential treatment that would clearly violate Sec. 703 or the Fourteenth Amendment.***The Court leaves open the question whether the race-conscious measures provided for in the consent decree at issue here were permissible under Sec. 703. I agree with the Court that it is not necessary to decide that question in the present posture of this case, and that any chalenge petitioner may make in the consent decree on substantive grounds, whether based on Sec. 703 or the Fourteenth Amendment should be left for resolution on remand.

Thus the existence of a valid constitutional claim that was not considered on the merits by the courts below has been shown. The mandatory intervention concept, shifts the responsibility to nonparties. It is inconsistent with the joinder provision of Rule 19, FRCP. That Rule makes it the litigating parties' responsibility to make certain that the court has before it all those needed to enable it to serve the ends of justice. **Consumers Union, Inc., v Consumer Prod. Safety Comm'n.,** 590 F.2d 1209, 1223 (D.C. Cir. 1978), rev'd on other grounds sub nom. **GTE Sylvania, Inc. v Consumers Union, Inc.,** 445 U.S. 375 (1980). Compulsory joinder or at the very least a consolidation of the two actions by the same judge hearing them at the same time was required here.

Even were parties required to intervene, there was a defacto intervention, in that the unities of time, issue, judge, court, and lack of existing final judgment prevented any of the perceived difficulties which give rise to the concerns underlying such concept from happening. In effect there was defacto intervention, and the complaint should not have bbeen dismissed in **Marino** and the Costello petitioners' appeal should have been entertained.

This is a case of national importance and the dispute between mandatory intrvention and compulsory joinder has caused procedural chaos and deprivation of substantive determinations of constitutional claims. The petition for a writ of certiorari should be granted.

Respectfully submitted:

RONALD PODOLSKY
Attorney for Petitioners

A-1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
No. 204-August Term, 1986

Decided December 8, 1986

Docket No. 86-7347

EVELYN MARINO, et al.,

Plaintiffs Appellants,
v.

JUAN U. ORITZ, et al,

Defendants Respondents

Before: Feinberg, Chief Judge, Winter and Mahoney, Circuit Judges.

Feinberg, Chief Judge:

This case requires an inquiry into what consitiutes a collateral attack on a consent decree. Evelyn Marino et al., appeals from a judgment of the United States District Court for the Southern District of New York, Robert L. Carter,

J., dismissing their complaint as a collateral attack on the settlement in Hispanic Society of the New York City Police Dep't v New York City police Dep't, 40 Empl. Prac. Dec. (CCH) 36,385 (S.D.N.Y. 1986). This appeal was argued at the same time as the appeal from the order in **Hispanic Society**, which has also been decided this day. Hispanic Society of the New York City Police Dep't v New York City Police Dep't, No :86-7507, slip op. at (2d Cir.). Appellants contend that their suit cannot be a collateral attack because their complaint was filed before the final order in **Hispanic Society** was entered. Because we think the district court properly viewed this action as a collateral attack on a consent decree, we affirm.

Facts

In the latter half of 1o84, the Hispanic Society of the New York City Police Department Inc. and the Guadians Association of the Police Department of the City of New York, Inc., tow groups that represent minority members of the New York City Police Department, brought Title VII suits against the Department and other City defendants alleging that the sergeant's examination given earlier that year and the promotion Eligible List based on the examination were racially discriminatory. The lawsuits were later consolidated into a single action and will be so regarded in this opinion. Although 12.3% of those taking the examination were black and 8.7% of them were Hispanic, blacks and Hispanics accounted for only 2.3% and 4.23%

respectively of th0se who scores qualified them for the Eligible List.

Three distict groups intervened in the lawsuit: the Sergeants Benevolent Association on behalf of those officers who had been provisionally appointed from the Eligible List, the Sergeants Eligibles Association on behalf of officers on the Eligible List who had not yet been promoted and various white ethnic societies and individuals for other officers not promoted. Following extensive discovery, city officials realized it would be difficult to prove that the sergeant's examination was job related and therefore, difficult to defend the examination's clear discriminatory impact. Accordingly, the two sides began serious settlement negotiations in hops of reaching an

accommodation that would alleviate the discriminatory mpact of the examination with a minimum of disruption to the Police Department.

Eventually, all the parties to the lawusit except the white ethnic socities reached a settlement. Under the agreement, all of the officers on the original Eligible List were to be promoted. In addition, a sufficient number of black and Hispanic officers were to be promoted so that each ethnic group's representatin in the new class of sergeants would approximate its representation in the entire group of those who took the examination. The accommodation was spurred by the growing need for sergeants on the plice force. The parties believed that this arrangement would eliminate the

examination's discriminatory impact while avoiding the morale and management problems that would ahave resulted had the entire examination been scrapped. The additionald black and Hispanic officers were to be added to the Eligible List in rank order of their scores on the written portion of the examination, sine it was conceded that the test did have some ranking value.

When the general terms of the settlement became clear, all the parties except the white ethnic groups stipulated that the Police Department could promote the officers left on the Eligible List and additional black and Hispanic officers in accordance witht he proposed settlement. The district court approved this interim settlement by order dated November 27, 1985. In April 1986,

the district court held a hearing on whether the proposed formal stipulation of settlemtnt was reasonable, fair and adequate ("the objector hearing")., and on June 16, 1086, issued an opinion approving the settlement ("the Consent decree").

Appellants filed the complaint in this action on December 30, 1985, after the interim settlement order in **Hispanic Society**, but before the final consent decree was entered. Pur@orting to represent a class of white police officers who were not placed on the Eligible List but who scored at least as high on the examination as the lowest scoring minority officer promoted under the interim order, appellants alleged that the proposed settlement deprived them of equal protection of the laws in

violation of the Fourteenth Amendment to the United States Constitution. Although appellants had no expectation of promotion since they had failed the examination, they demanded that they too be made sergeants. On April 29, 1986, Judge Carterr, who was also presiding over the **Hispanic Society** litigation, dismissed the complaint.

Discussion

It is well settled that collateral attacks on consent decrees entered in Title VII actions are not permitted, e.g. Prate v Freedman, 430 F.Supp. 1373 (W.D.N.Y), affd mem., 573 F.2d 1294 (2d Cir. 1977), cert denied, 436 U.S. 922 (1978); Dennison v City of Los Angeles Dep't of Water and Power, 658 F.2d 694 (9th Cir. 1981). The salutory policies underlying this rule are

familiar. Allowing the terms of a consent decree to be contested in separate lawsuits would raise the specter of inconsistent or contradictory proceedings., would promote continued uncertainty thus undermining the concept of final judgment and would violate the policy of promoting settlemtn in Title VII actions. Prate v Freedman, 430 F.Supp. at 1375; Thaggard v City of Jackson, 687 F.2d 66, 68-69; (5th Cir. 1982), cert. denied sub nom., Ashley v City of Jackson, 464 U.S. 900 (1983); Austin v County of DeKalb, Dep't of Pub. Safety, 572 F.Supp. 479,481 (N.D. Ga. 1983); O'Burn v Shapp.,70 F.R.D. 549, 552-53 (E.D. Pa.), aff'd mem. sub nom. Lutz v Shapp, 546 F.2dd 417 (3d Cir. 1976), cert denied, 430 U.S. 968 (1977). These policeis are squarely implicated in

the action before us and require that we affirm the dismissal of appellants' complaint as an impermissible collateral attack.

Admittedly, Judge Carter had not given final approval to the consent decree in **Hispanic Society** at the time he dismissed the lawsuit. Yet, the **Hispanic Society** litigation had proceeded to a very significant stage. a basic settlent had been reached and an interim order that matched the terms of the ultimate consent decree had been filed. A hearing had been scheduled to determine whether the proposed settlement was reasonable, fair and adequate. Had appellants been allowed to maintain this lawsuit under these circumstances, the parties' incentive to pursue the **Hispanic Society** settlement would have been seriously

eroded; the settlement would have had no utility it it failed to prevent further litigation of the matter. Furthermore, since even the later acutual entry of the consent decree in **Hispanic Society** would not have decided the issue, the concept of final judgment would have been undermined. By the same token, this lawusit would have relitigated the propriety of the settlement, thus inviting conflicting results. That appellants' complaint was before the same judge who was presiding in **Hispanic Society** does not change the result. See: Black and White Children of the Pontiac School System v School Dis't, 464 F.2d 1030 (6th Cir. 1972) (per curiam). There could be no certainty that the two proceedings would continue in parallel fashion. Thus, Judge Carter was correct

deeming this suit an impermissible collateral attack on a consent decree.

Appellants' proper course, as in most cases whre collateral attacks have been dismissed, would have been to intervene in the lawsuit from which the consent decree issued. Dennison v City of Los Angeles,658 F.2d at 696; Black and White Children of the Pontiac School System v School Dist., 464 F.2d 1030. Indeed, appellees suggested precisely this couse to appellants. If intervention had been denied, the proper course would have been to appeal that denial, Burns v Board of School Comm'rs, 437 F.2d 1143 (7th Cir. 1971) (per curiam). Attempting intervention in **Hispanic Society** was obviously available to appellants when they commenced this action, since the final consent decree in that litigation had not yet issued.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EVELYN MARINO, et al.,

Plaintiffs,

v.

JUAN U. ORITZ, et al,

Defendants.

MEMO ENDORSED

8/24/86

Motion granted. Prate v Freedman, 430 F.Supp. 1373, 1375 (WDNY), aff'd mem, 573 F2d 1294 (2d Cir 1977), cert denied, 436 US 922 (1978). Clerk to enter judgment.

s/ROBERT L. CARTER, USDJ

P

(same title COMPLAINT)

PLAINTIFFS as and for a complaint herein respectfully allege:

1. Jurisdiction is conferred by virtue of 42 USC 1983; 5th & 14th Amendments, United States Constitution; and 18 USC 1343, in that it is alleged that persons acting under color of state authority are depriving plaintiffs of Equal Protection of the Laws, as part of an established procedure.

2. At all times hereinafter mentioned the plaintiffs were and still are police officers of the New York City Police Department having attained said position by virtue of competitive examination.Said rank being the entry level civil service position.

3. At all times hereinafter

mentioned the defendant JUARN U. ORTIZ was and still is Personnel Director of The City of New York, and the Defendant BENJAMIN WARD was and still is Police Commissioner of the City of New York.

4. The rank of Sergeant, New York City Police Department is a civil service supervisory position of next higher rank than that of Police Officer, and appointment thereto is required by state law to be made by virtue of police officers taking and passing a competitive examination.

5. There are two higher ranks which are civil service and competitive, those being Lieutenant and Captain respectively, and one must first attain the rank of Sergeant in order to compete for the rank of lieutenant.

6. At all times hereinafter

mentioned the defendant ORTIZ had the authority, through his agents and employees, to prepare, promulgate, administer, grade, and certify results of competitive examinations for promotion to appointing authorities, including that for the position of Sergeant, New York City Police Department. At all relevant times hereinafter mentioned the defendant WARD was and still is the appointing authority to the position of Police Sergeant.

7. That the requirements of the New York State Constitution Article 5, Section 6 provides in relevant part that appointments and promotions in the civil service of the state and all of the civil divisions thereof shall be made according to merit and fitness to be ascertained, as far as practicable, by examination,

which, as far as practicable shall be competitive. The City of New York is a municipal corporation and a civil division of the state of New York.

8. Heretofore the defendant ORTIZ did cause an examination for Sergeant, New York City Police Department be be prepared, administered and graded, and, based upon the results thereof certain persons were determined to have passed the said examination and have by reason thereof been promoted to sergeant. Said examination was administered to various police officers including the plaintiffs in June, 1983.

9. That in developing the said examination defendant ORTIZ sought and did obtain outside assistance from a firm of experts specializing in test preparation to insure that the test was

fair.

10. That the examination consisted of two parts--technical knowledge and job sample (video viewing) questions--which were to be answered by selecting one of four possible choices as the correct answer thereto.

11. The position of sergeant is a supervisory one wherein police officers are those of lower rank who are the supervised. It is also a position opportunity of long standing expectation in advanceement into supervisory ranks, as there is a minimum service requirement which must be met as a prerequisite thereto. All plaintiffs met such prerequisite.

12. The defendants have made promotions to the position of sergeant of persons all of whom have passed the

examination, some of whom have grades equal to or lower than the grades attained by variou plaintiffs who competed with them on the same examination. Plaintiffs have not been designated by the defendant ORTIZ as having passed the said examination.

13. The 14th Amendment to the United States Constitution mandates that all persons within a state be accorded Equal protection of the Laws.

14. A candidate who has a grade equal to or higher than one who has passed the examnation has also passed that examaination.

15. The failure of the defendants to deem all persons with grades equal to or higher than the grades of those who passed that examination as also having passed it is a denial of Equal Protection

of the Laws as well as the requirement that promotions be based upon merit and fitness to be determined by competitive examinatin

16. Such plaintiffs as have a grade equal to or higher than one heretofore promoted to sergeant by virtue of the same competitive test have passed the examination and have earned the right to have their merit and fitness evaluated by the appointing authority for the same position. They have been unlawfully deprived of the opportunity to be evaluated on their said merit and fitness by reason of the determination of the defendant ORTIZ not to assign a passing grade to them. Said determination was and is arbitrary, capricious, unreasonable and unlawful, and does trammel the constitutional rights of the

plaintiffs, and said determination has been participated in by the defendant WARD or his agents and employees.

17. That the examination as developed and administered by the outside experts and the defendants was done so by acceptable standards fully compliant with requirements to avoid unfairness.

18. That in November, 1985, the defendants made certain promotions to the rank of sergeant by reason of rerating of the said examination. The rerating was justified because certain questions threin were discovereed to be not job-related. Said questions, upon information and belief, were both in the technical knowledge and job sample portions of the examination. Defendants did determine that the pass marks should be adjusted to remedy this objectively

ascertainable fact.

19. The adjusted pass mark was not equally accorded to all candidates who took the test, thereby depriving such persons, including the plaintiffs herein of Equal Protection of the Laws.

20. That the action of the defendants as aforesaid deprived those candidates who attained a mark equal to or higher than others promoted to sergeant of a legitimate and long-standing and officially encouraged expectation of equal opportunity to advance into supervisory ranks and to be evaluated on their merit and fitenss as required by the competitive standard set for civil service promotional examinations.

21. By reason of the aforesaid plaintiffs are now of lower rank than

persons promoted to sergeant and are subject to being supervised by persons whom they outscored on the competitive examination.

22. All persons heretofore promoted to sergeant by reason of the examination herein have achieved passing grades thereto, as have such plaintiffs who attained the equivalent or higher grade as those promotees.

23. By reason of the foregoing, the plaintiffs have been deprived of Equal Protection of the Laws by persons acting under color of state authority.

23. All persons within the state of New York should be treated fairly and equally. Were all persons with equivalant or higher marks than those already promoted considered to have passed the examination as required by

Equal Protection of the Laws, no prejudice to the defendants would inure as there are currently over four hundred vacancies in the rank with hundreds accruing by retirement, promotion and attrition each year. Moreover all persons considered to have passed as a result of this examination have been promoted or passed over and no current list yield from the subject examination exists, nor would anyone who competed in the examination be personally prejudiced or supplanted. Moreover the municipal respondents would save tens if not hundreds of thousands of dollars over the next two or three fiscal years by reason of not having to prepare, administer, grade, certify and defend a new examination, thereby benefitting the body politic at large, eradicating the

deprivations of constitutional rights of these plaintiffs, strengthening the concept of competitive pomotional examinations and restoring confidence and morale throughout the membership in all ranks of the New York City Police Department.

24. At present there are hundreds of vacancies in the rank of Sergeant, New York City Police Department and no subsequent examination has been given to fill them. Moreover several hundred vacancies accrue each fiscal year.

25. That heretofore defendants' highly qualified inside and outside experts determined that lower marks on the examination were appropriate. However, by misjudging the needs of the service, as evidenced by the current hundreds of vacancies currently extant

with no current list of eligibles, they raised the pass mark, yielding the latest exhausted eligible list. Had the mark stayed as originally set some of the plaintiffs herein would have passed by reason of attaining that original pass grade.

26. Persons with the equvalent or higher grade on a competitive examination than persons already promoted as having passed it, prima facia are equally or more competent to fill the position of Sergeant, New York City Police Department than those said promotees and are justly entitled to be considered by the appointing authority for promotion to the rank, by reason of constitutionally protected Equal Protection of the Laws and also by reason of the needs of the service as evidenced by the hundreds of

current and projected vacancies for which no current list of eligibles exist.

27. There currently exists a critical shortage of sergeants in the New York City Police Department and there is no current list of eligibles to fill it.

28. No person would be displaced from entitlement to be considered for promotion to sergeant, nor be reduced from sergeant to police officer were the plaintiffs herein accorded Equal Protection of the Laws respecting equavalent or higher marks attained by them on the examination which led to promotions of others with whom they competed.

29. Constitutional as well as fiscal responsibility will be demonstrated by the defendants if the plaintiffs are oaccorded Equal Protection of the Laws as

aforesaid, and many thousands of dollars of public funds would be saved if the existing hundreds of current and projected openings in the rank were filled by persons who have already demonstrated their merit and fitness to be conidered for promotion to the rank.

WHEREFORE: plaintiffs respectfully seek judgment against the defendants (1) directing that the defendant ORTIZ or his successors designate such persons who have a grade equal to or higher than a candidate on the subject sergeant examination who has heretofore been promoted to sergeant, to have passed the examination; (2) directing the defendnt WARD or his successors to utilize such designation of persons as passing the examination in his considering for promotion to now current and the next

succeeding openings in the sergeant rank until all said persons have been considered, irrespective of any limitation of time in which an eligible list would normally run; (3) staying the administering of any test for the said rank of Sergeant, New York City Police Department, or certifying the results thereof until the defendants have fully complied with the requested directions; (4) that back pay, entitlements, promotional opportunities and seniority be accorded such persons who are promoted to sergeant by reason hereof as partial damages, and (5) reasonable attorney fees for the prosecution of this action.

RONALD PODOLSKY
Attorney for Plaintiffs

(same title Declaration in Support of motion to dismiss.)

STEVEN H. MOSENSON, An attorney admitted to the bars of the State of New York and the United State District Court, Southern District of New York declares under penalty of perjury that the following is true and correct:

1. I am an Assistant Corporation Counsel in the Office of Frederick A.O. Schwarz, jr., Corporation Counsel of the City of New york, attorney for defendants, and I make this declaration in support of the defendants' motion to dismiss this action for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. A copy of the complainti in this action is annexed hereto as Exhibit 1.

2. This action is a collateral attack on the interim orders and the proposed class action settlement in an action entitled **The Hispanic Society, et al., v New York City Police Department, et al.,** index No. 984 Civ. 6629 (RLC), currently pending before this Court. The **Hispanis Society** litigation arises out of the defendants' administration of a promotional examination for Police Sergeant in 1984: the interim settlement and proposed final settlement permit promotion of a fixed quota of minorty candidates who had otherwise not received a score above the eligibility cut-off score. As is demonstrated by the accompanying memborandum of law, this Court does not have jurisdiction over the subject matter of this action and accordingly, the aciton must be

dismissed.

3, Plaintiffs' claim, predicated on 42 USC 1983 and the United States Constitution, 5th and 14th Amendments also fails to state a claim upon which relief can be granted. Plaintiffs seek to emasculate a court approved stipulation imposing reasonable minority quotas, designed to remedy the effects of alleged racial discriminatory practices in the past, by upsetting the voluntarily adopted ratios of minority promotions and recreating the racial impalance which the **Hispanic Society** settlements seeks to redress. Plaintiffs, who do no claim to be victims of discrimination by defendants' administration of the promotional examination that is the subject of the **Hispanic Society** litigation, cannot claim a right to the

remedy afforded minority candidates who were discriminated against. As the accompanying mememorandum of law demonstrates, the complaint fails to state a claim upon which relief can be granted and must be dismissed.

The Sergant's Examination and the Hispanic Society Litigation

4. In June and July, 1984, defendants adminstered Civil Service Examination No. 2548 for promotion to New York City Police Sergeant. The resulting eligibility list ranked all candidates who took and passed the examinatiion. 8.95% of all candidates, 4.39% of all Hispanic candidates and 1.62% of all black candidates passed the examination.

5. The (Hispanic Society plaintiffs

commenced an action alleging that promotion to Police Sergeant from the list of eligible candidates promulgated as a result of Examination No. 2548 wuld constitute unlawful discrimination. A copy of the **Hispanic Society** complaint is annexed hereto as Exhbit 2.

6. Various interim orders during the **Hispanic Society** litigation permitted defendants to provisionally promote candidates off the Examination No. 2548 Eligibility List. Most recently, in December 1985, provisional promotions were permitted with a quota of black and Hispanic candidates.

7. the **Hispanic Society** litigaton has resulted in a proposed classwide settlement, wherein minority candidates who did no score above the cutoff score extablished by defendants for

eligibilityfor promotion would be promoted according to the following procedures:

(a) Exhausting the elibility list coupled with permanently appointing those candidates previously provisionally appointed to police sergeant;

(b) Promoting to Sergant Hispanic police officers such that the percentage of Hispanic officers promoted eqals 8.65% of the total number of candidates promoted to sergant. This ratio is to be accomplished by lowering the examination cutoff score one score level at a time for Hispanics and rank ordering, and then promoting, Hispanic candidates until the stiplated percentage is obtained.

(c) Promoting to sergeant black police officers such that the percentage of black officers promoted equals 12.25%

of the total number of candidates promoted to sergeant. This ratio is to be accomplished by lowering the examination cut off score one score level at a time for blacks, and rank ordering, and then pomoting black candidates until the stipulated percentage is obtained.

8. The proposed Hispanic Societysettlement has not yet been approved by this Court althougn filing of the proposal is impending and approval expected shortly.

The Marino Complaint

9. The instant action, served on December 30, 1985, is brought by over 300 white candates who proportedly scored below the eligibility cut off score but above the score of the lowest ranking

minority who was promoted to the interim orders in **Hispanic Society.** Plaintiffs seek to lower the eligibility cut off for white candidates. Were plaintiffs to be successful, they would disrupt the voluntary adopted black and Hispanic quotas because those white officers, if eligible for promotion, may be entitled to promotions under the New york Civil Service Law. This would necessitate a further lowering of the cut off score to retun to the desired ratios.

10. The proper forum for plaintiffs' complaint is in the form of an objection to the proposed settlement. Defendants therefore respectfully request that this Court dismiss the instant action and direct plaintiffs to seek intervention in the **Hispanic Society** litigation, or to file objections to the consent decree

once proposed.

WHEREFORE it is respectfully requested that defendant's motion to dismiss the complaint in this action be granted in all respects and the defendants be awarded costs and attorney fees togetherr with such other and further relief as this court deems just and proper.

Dated: New York, N.Y. February 9, 1986.

(same title OPPOSING AFFIDAVIT)

STATE OF NEW YORK
COUNTY OF NEW YORK:ss

RONALD PODOLSKY attorney for plaintiffs being duly sworn deposes and says:

That he makes this affidavit in opposition to the motion of the defendants to dimiss the complaint herein, and in support of a cross motion for summary judgment in favor of the plaintiffs based upon the averment that there is no legitimate defense to the allegations in the complaint or to the relief sought therein.

At the outset is must be emphasized that the complaint and the papers previously submitted respecting the issue of transfer of this case from Judge Sweet to Judge Carter specify that the case is

not a Title VII racial discrimination complaint, but rather one brought on Equal Protection of the Laws. To the extent that the Consitution of the State of New York requires that promotion to supervisory ranks be based upon a showing of merit and fitness by competitive examination and such be viewed as a contractual obligation on the part of the state, then also the case has the added grounds based upon the Impairment of Contracts prohibition of the United States Constitution.

It is the plaintiffs' position that because certain questions were objectively ascertained to be not job related, the passing grade of the subject sergeants' examination was adjusted; that by reason of such adjustment certain persons were perceived by the defendants

to have demonstrated their merit and fitness and were promoted. Plaintiffs agree that such persons had indeed demonstrated their merit and fitness and were deserving of promotion; that persons with an equivalent or higher grade to one previously promoted have also objectively and competitively demonstrated their merit and fitness for the position; and that defendans acting under color of state authority are depriving plaintiffs of Equal Protection of the Laws by reason of defendants' perception that plaintiffs have not demonstrated their merit and fitness at having met the same competitive standard.

It is clear that the plaintiffs have an absolute right to seek redress of grievances in the United States District Court under Equal Protection of the Laws

and that the court has jurisdiction over the subject matter. The motion to dismiss seeks to convice the court that it is powerless to take judicial cognizance of the matter. In such a motion the allegation of the complaint are deemed to be true for the purposes of the motion only, and there is no question that the allegations spell out a violation of the constitutional requirement of Equal Protection of the Laws, and conincident thereto the Impairment of Contracts prohibition in the United States Constitution.

Defendants are attempting to avoid the necessitiy of answering the allegations of the complaint because they know full well that they are true, and are seeking to transform the case into a racial conflict. They do this by

suggesting that this is a suit by white officers against minority officers. This suggestion is untrue and the defendants know it. Defendants having access and control over the personnel folders of the plaintiffs know full well that White, Hispanic, Asian and other racial religious and gender groups are included. Members of the force who are black were not excluded and if they are not plaintiffs it is because the impact of the non job related questions has already been rectified by the defendants. To hold that the officers who benefitted by this rectification somehow have not shown their merit and fitness for the position is racially insulting to those persons. Moreover it is clear that the defendants would not permit promotions of such persons who are perceived to be not fit

for the position. Plaintiffs contend that previously promoted persons have shown their merit and fitness, and contrary to the assertions of the defendants, the plaintiffs are not seeking to undo the promotions. Plaintiffs are not mere objectors in another action, and hence the cases relied on by defendants are not controlling. The complaint is fully cognizable in the district court on its own merits.

The outrageous implications of the defendants that those previously promoted persons somehow have failed the examination and are unqualified to be promoted is belied by the fact that non job related questions apply to everyone equally. It is well known for example that the elements of a specific degree of

a crime perceived by an officer to have been committed by a suspect or the degree of the crime itself is not, and need not, be committed to memory of a sergeant. When an arrest is made the sergeant invariably looks in a book (as do lawyers and judges and police officers of higher rank) to determine the charge. The only job related REQUIREMENT that elements of a degree of a crime be specifically known and committed to memory are elements of those crimes justifying use of deadly force. As has been reported in the press the city officials including Mayor Koch and Judith Levitt, successor to Juan U. Ortiz, have stated that the examination contained many such non job related questions and hence the mark should be adjusted to reflect this fact. Moreover, the same officials indicated that the

pass mark in the first instance was set too high because of a miscalculation in the needs of the service which were much larger than projected, thereby exhausting the current list and leaving hundreds of vacancies still unfilled. The sensible approach would have been an orderly point by point lowering of the marks to the two written portions of the examination or some other method which would not deprive candidates of Equal Protection of the Laws.

It was sugested in the papers relating to transfer of the case, which papers are annexed hereto, that the non job related questions were and are objectively ascertainable and that the inappropriateness thereof was visited upon all candidates regardless of subjectively ascertainable attitudes.

The defendants did not deny that at least one such person previously promoted by reason of the pass mark adjustment possessed a masters degree, although they had ample opportunity to deny in their letter submitted in reply. Affirmant has since been informed that the individual may also be an instructor at the Police Academy teaching police science subjects. These observations further fortify the position that the non job related questions had impact across the full panoply of candidates without regard to inappropriate considerations of a subjective nature. It is probable that other beneficiaries of the adjusted grade have college degrees or credits. To think otherwise would be racially insulting.

Defendants are engaging in racially

insulting behavior if they seek to imply that those previously promoted cndidates did not in fact demonstrate their merit and their fitness for the position for which they competed. Further supportive of the proposition that those persons have passed the examination on their own merit is borne out by the letter of a Deputy Mayor of the City of New York purporting to speak for Mayor Koch and the defendant City of New York which letter is annexed hereto. The seeming change of position in defendants' motion papers is further asacerbated by the stance they now take that the redress given in the companion case was voluntarily arrived at by the city.

Defendants have no authority to seek by this motion to rewrite the complaint of the plaintiffs and to make a racial

issue out of a pure Equal Protection of the Laws standing. The complaint is judicially cognizable as is and must stand or fall on the merits of the case. Were the relief sought in this case granted, all parties with an equivalent or higher grade would be accorded Equal Protection of the Laws and would comply with the Impairment of Contracts prohibition as well as the New York Constitutional requirement that supervisory ranks be filled by persons who have demonstrated their finess by reason of competitive objective examination. No one heretofore promoted would be demoted. Hundreds of existing vacancies would have a pool of qualified candidates from which to be filled; any perceived racial discrimination has already been rectified; no new

examination has been given nor is there any existing list which would be impinged upon; illfounded perceptions by the defendants that the plaintiffs herein are in racial or other than constitutional conflict with prior events would be disasabused; persons who outscored others on the same competitive examination would not be required to be supervised by such unless they are not promoted for other legitimate reasons; the long standing, legitimate and governmentally encouraged expectation of entry into supervisory ranks held in common by all members of the force would be honored; the monetary loss of expected pay and timely and legitimate advancement to ranks above sergeant will be exonerated; the validity of the examintion as having met the 2d Circuit admonition that outside experts

be consulted will no longer be denied by defendants who originally profesed said validity; the adjustment will be rightly viewed as an objectively ascertainable correction of the situation wherein non job related questions distorted the results of everyone respecting demonstration of merit and fitness and was not a paternalistic beneficence bestowed upon two discrete insular minorities as the defendants now seek to depict it, and, finally, it will be the right thing to do.

The defendant have confused entry level considerations with those of advancement into supervisory level considerations. Exclusion from legitimate expectation of avancement is improper governmental action both in a constitutional and in a contractual

sense. Had defendants accorded equal treatment to plaintiffs by declaring them to have demonstrated their merit and fitness to the position, defendants would not have practiced exclusion. Thereafter any discrimination, real or imagined based on past or present racial factors arguably could be a consideration used by the appointing authority with respect to timing of promotion of the various candidates, so long as such consideraton is not used as an exclusionary device respecting persons who have demonstrated equivalent or higher fitness by reason of the competitive examination.

The defendants by adjusting the mark to reflect the fact that there were objectively ascertainable non job related questions which were non job related with respet to everyone, have violated the

constitution by refusing to adjust the mark equally of all candidates who took the same examination.

The allegations of the complaint unless denied are deemed to be true. On its face the complaint states a cognizable cause of action in the district court. Moreover there appears no legitimate defense to the complaint and there has been no denial of the facts thereof. In absence of any defense presented, the court should award judgment on the complaint for the relief sought therein.

It should be noted that the complaint requests an injunction against further promotional examinations until all persons with a mark equivalent to or higher than a previously promoted person be considered by the appointing authority

for promotion. There atre currently hundreds of vacancies in the rank and the current list has been exhausted. The proper approach which would lessen the effect of the trammeling of the competitive and constitutional rights of the plaintiffs is to refrain from giving any further examinations untill this pool of qualified persons have been considered for promotion that the current and next succeeding vacancies. The persons heretofore promoted would enjoy higher seniority increments, which would impact on standing in higher ranks promotional examinations wherein seniority is a grading factor, would have salary incremental benefits, vacation pick advantage and, more importantly, will have and currently have the advantage of supervisory experience which should work

to their advantage in taking future promotional examinatins. Thus the relief sought by the plaintiffs would exonerate their constitutional and contractual expectations which they have earned, and at the same time the previously promoted candidates with an equivalent or lower grade than the plaintiffs would have had any discrimination exonerated with attendant preferential advantages respecting future career opportunities. The defendants would benefit as well by having numerically more minorities than would have originally been generated by the test as originally marked, and would save considerable expense in giving an unnecessary new sergeant examination. Moreover, by ataying any new sergeant examination those in the rank of police officer would attain more time on the job

and hence more experience as a prelude to advancement to sergeant.

BY REASON WHEREOF deponent respectfully requests that the motion of the defenants to dismiss be deneied and that the motion for judgment on the complaint be granted.

RONALD PODOLSKY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EVELYN MARINO, et al.,

Plaintiffs,

v.

JUAN U. ORITZ, et al,

Defendants.

MEMO ENDORSED

8/24/86

Motion granted. Prate v Freedman, 430 F.Supp. 1373, 1375 (WDNY), aff'd mem, 573 F2d 1294 (2d Cir 1977), cert denied, 436 US 922 (1978). Clerk to enter judgment.

s/ROBERT L. CARTER, USDJ

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO.200 AUGUST TERM, L986

(ARGUED OCTOBER 1986 DECIDED DECEMBER 8, 1986)

DOCKET NO. 86-7507

The Hispanic Society of the New York City police Department, Inc., et al,

Plaintiffs-Appellees

v.

The New York City Police Department, et al, Defendants-Appellees,

v.

Wayne Costello, et al, Appellants

Winter, Circuit Judge:

This appeal is from an order approving the settlement of a classwide claim of employment discrimination. It was argued at the same time as a companion case, **Marino v Ortiz,** no.

86-7347, slip op. at (2d Cir.), which has also been decided this day. The underlying action brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2 et seq. (1982), challenged a sergeans' examination administered by defendant appellee New York City Police Department ("NYCPD"). The plaintiffs alleged that the examination had a disparate impact upon black and Hispanic candidates for promotion to the position of sergeant. The settlement approved by the district court called for the successive promotion of blacks and Hispanics who had taken the examination until the alleged disparate impact was eliminated. The appellants who challenged the settlement as a violation of the fourteenth amendment are said to be police officers who did not

score high enough to be eligible for promtion bud did as well or better than the blacks and Hispanics who have been promoted pursuant to the consent decree. Because the appellants are not parties to this litigation, we dismiss their appeal.

BACKGROUND

During June, 1983 and April 1984, the NYCPD administered Civil Service Examination No. 2548 to 11,899 candidates for promotion to the rank of sergeant. After scoring the exam, the NYCPD set a cut-off point that produced a list of 1,041 police officers eligible for promotion. The racial/ethnic composition of the group taking the exam was 79.0% white, 12.3% black, and 8.7% Hispanic.

In late 1984 the Hispanic Society representing Hispanic police officers, and the Guardians Association,

representing black officer, filed separate actions in the Southern District against NYCPD and various city officials, alleging employment discrimmination in violation of Title VII and other provisions.[1] The complaints alleged that the examination had a disparate impact on black and Hispanic candidates and was no job related. Three groups were permitted to intervene in both cases as codefendants: the Sergeants Benevolent Association ("SBA"), representing over 500 officers on the eligible list who had obtained provisional appointments as sergeants; the Sergeants Eligibles Association ("SEA"), representing officers who were on the eligible list but had not received provisional appointments; and various white ethnic soiceties and other individual officers

(the "Schneider Intervenors"). On June 14, 1985, the district court certified plaintiffs in **Hispanic Society** as representatives of a class of all Hispanic candidates who had taken Examination no. 2548, pursuant to Fed. R. Civ. P. 23(a) and (b)(2).

After discovery the parties began several months of settlment negotiations. A proposed settlement agreed to by the plaintiffs, the defendants, SEA and SBA was submitted to the district court on February 7, 1086. The settlement provided that at least 1,000 police officers on the eligible list would be promoted to sergeant. Black and Hispanic police candidates not on the list were to be added until the racial/ethnic composition of the group of newly promoted sergeants was approximately the

same as the racial/ethnic composition of the group of candidates taking the test. Additional black and Hispanic officers would be promoted in rank order on the basis of their raw scores on the technical knowledge portion of the exam.[2]

The settlement also proposed consolidation of the **Hispanic Society** and **Guardians Association** actions and the certification of three additional classes: (1) the plainiffs in **Guardians Association** as representatives of a class of all black candidates who had taken the examination; (2) SBA as the representative of a class of all officers on the eligible list who had been provisionally appointed to the rank of sergeant; and (3) SEA as the representative of all other officers on the eligible list.

The settlement was conditionally approved on February 7, 1986, and a hearing was scheduled for April 17, 1986. Notice of the proposed settlement and the hearing date was sent to all plaintiffs and intervenors, and posted in all precinct stations. The Schneider Intervenors who had not signed the proposed agreement, were the only parties to the action to oppose the settlement.

Objections were also filed by officers who were not on the original eligible list but who claimed to have received scores equal to or higher thant he black and Hispanic officers to be promoted to pursuant to the settlement. The same counsel who represents the appellants in the instant case was allowed to speak a the hearing and argued that the proposed settlement violated the

rights of such officers to equal protection of the laws. He filed a "Request for Modification" on behalf of his clients seeking to have the consent decree modified to provide that they be put on the eligible list and pomoted.

Judge Carter approved the settlement on June 16, 1986, specifically rejecting the argument made by appellats' counsel. **Hispanic Society of the New York City Police Dep't v New York City Police Dep't,** 40 Empl. Prac. Dec. (CCH) 36,385 at 43,654-55 (S.D.N.Y. 1986). The Schneider Intervenors filed notices of appeal. Approximately 350 other officers (a considerably larger group than filed objections), also filed notices of appeal. The Schneider Intervenors withdrew their appeal, however, leaving the appeal of the 350 officers as the

only remaining challenge tc the settlement of the case.

DISCUSSION

Appellants, the 350 officers, argue that the settlement agreement violates the fourteenth amendment because it requires the promotion of minorities over nonminorities who achieved the same or better scores on the sergeants' examination. We cannot consider this argument on the mrits, however. Because appellants never moved to intervene in these proceedings, they are not parties to this litigation. and their appeal must be dismissed.

As a general ruie, only a party of record in a lawsuit has standing to appeal from a judgment of the district court. **United States ex. rel. Louisiana v Jack,** 244 U.S. 397, 402 (1917); **Martin**

Trigona v Shiff, 702 F2d. 380, 385)2d Cir. 1983); **United States v McFaddin Express, Inc.,** 310 F.2d 799, 801 (2d Cir. 1962). Parties of record include the original parties and those who have become parties by interventioh, substitution or third party practice. 9 J. Moore, **Moore's Federal Practice** 203.06 at 3-20 (1986).

There are exceptions to this general rule, but none is relevant to the present matter. The primary exception is when the nonparty has an nterest that is affected by the trial court's judgment. E.g., **Martin Trigona v Shiff,** 702 F.2d at 385-86 (permitting nonparty trustee to appeal from order granting debtor's hagbeas corpus petition against bankruptcy judge.) See also **United States v LTV Corp.,** 746 F.2d 51, 54-54 '

NN.5-6 (D.C. Cir. 1984); 9 **Moore's Federal Practice** 203.06, at 3-23. In this case appellants were not on the oiginal eligible list, they have no right to promotion under state law and they do not allege that the examination discriminated against them. Even if the settlement were invalidated, therefore, they would no be entitle to promotion. accordingly they cannot appeal from the settlement as nonparties with an interest in the order below.

Appellants claim to have standing as parties , and to that end point to a "Definition" in the settlement agreement. That definition states:

The "New York City defendants shall mean and refer to the City of New York, The New York City Police Depatment, the New York City Departmen of Personnel, and all

officers, employees or agents whether elected or appointed of the City of New York, but not including the Hispanic Society plaintiffs, the Guardianns Association plaintiffs, the intervenor defendatns or any individuals or groups represented by the Hispanic Society plaintiffs, the Guardians Association plaintiffs or the intervening defendants.

Appellants assert that they fall within this definition because they are police officers employed by the City of New York. However, the definitions in the settlementby their very terms delineate the parties to the agreement and not the parties to the litigation. For example, the settlement defines "intervenor defendants" to mean the SBA and the SEA. By appellants' logic, the Schneider Intervenors would be divested

of party status because they are not included in the definition. Yet, the Schneider Intervenors are intervenor defendants, and werre omitted from the settlement definition because they were not signatories to the settlement. Just as the settlement cannot divest a plaintiff or defendant of party status in the litigation, it cannot confer party status on a nonparty.

Further, viewed in context, the definintion of "New York City defendants" does ntot make appellants either parties to the settlement or parties defendant in their individual capacities. This provision of the settlement simply bnds them to comply with its terms in their official capacities as employees of the defendnts, and does not give them standing to raise their current

objections to the settlement as violative of their individual rights.

In **Bender v Williamsport Area School District,** 106 S.Ct. 1326 (1986), the Supreme Court rejected on jurisdictional grounds a similar attempt to appeal. In that case, high school students brought an action against a school district, members of the school board, and school administrators, challenging certain restrictions on the use of public school premises under the first amendment. The trial court found in favor of the plaintiffs, but granted no relief against any of the school board members in their individual capacities. When the school distric decided not to appeal the adverse decision, board member Youngman decided to prosecute the appeal hinmself. The Surpeme Court, acting **sua sponte**, held

that because the judgment was aginst Youngman only in his official capacity, he had no standing to appeal in his individual capacity. **Id.** at 1332 (citing **Kentucky v Graham,** 105 S.Ct. 3099,3106 n.14 (1985); **Brandon v Holt,** 105 S.Ct. 873,877 (1985)). Noreover, Youngman's statusas a board member did not "permit him to 'step in the shoes of the Board' and invoke its right to appeal." Bender, 106 S.Ct. at 1333. The Court also denied Youngman's claim that he could prosecute the appeal based on his status as a parent, stating, "Since Mr. Youngman was not sued as a parent in the District Court, he had no right to participate in the proceedings in that count in that capacity without first filing an appropriate motion or pleeding setting forth the claim or defense that he

desired to assert.". Id., at 1335 (footnote omitted).

The lack of jurisdiction is even more obvious in the present case, because unlike Youngman, appellants were never parties in the district court in any capacity. They were included only in the settlement agreement, along with all other employees of the City of New York, merley to ensure that they would be bound by its terms in their official capacities. See **Bender**, 106 S.Ct. at 1332; **Brandon**, 105 S.Ct. at 877 (The course of proceedings ... make(s) it abundantly clear that the action against [defendant] was in his official capacity and only in that capacity.). See also **Alexander v Todman**, 361 F.2d 744, 746 (3d Cir. 19666) ("A person who sues or is sued in his official capacity is, in

contemplation of law, regarded as a person distinct from the same person in his individual capacity and is a stranger to his rights or liabilities as an individual.") Appellants' argument that the settlement agreement made them parties in their individual capacities is thus without merit.

Appellants also claim that filing written objections to the settlement and appearing at the hearing gave them staus as parties to the litigation. The fact that appellants were permitted to object to the settlement in the district court did not make them parties, or enable them to appeal from the approval of the settlement. See: **United States v LTV Corp.**, 746 F.2d at 53; **Moten v Bricklayers Masons ' Plasterers International Union**, 543 F.2d 224,227

(D.C. Cir. 1976).

Appellants' predicament results from their stedfast refusal to comply with the requirements to comply with the requirements for intervention set forth in Fed. R. Civ. P.24. In dismissing the appeal in **Bender,** the Supreme Court emphasized the importance of this rule:

> Because his status as a parent was obviously different from his official status as s a member of the Board, in order to participate as a parent in the District Court litigation it was incumbent upon Mr. Youngman under Rule 24 of the Federal Rules of Civil Procedure to make "timely application" byan appropriate motion "stat[ing] the grounds" for intervention and "setting forth the claim or defense for which intervention is sought." Fed. Rule Civ. Proc. 24(a), (c). No such pleading was filed in either of the courts below. **It is particularly important to observe these requiremens in cases in which the interest of the litigant**

> **s in which the interest of the litigant seeking to appeal diverges from the interest of the party to the suit.**

106 S.Ct. at 1335 n.9 (emphasis added). The need for formal intervention is thus as great as the need for named plaintiffs or defendants to state a well pleaded claim or defense. See **Sanders v John nuveen 7 Co.,** 463 F.2d 1075, 1082 (7th Cir.0 (pleading that accompanies intervention motion must satisfy Fed. R. Civ. P. 7(a) so that "all parties understand the position, claims and nature of relief sought by the prospective intervenors"), Cert denied, 409 U.S. 1009 (1972); 3B **Moore's Federal Practice** 24.14.

The present appeal, however, is based on factual assertions that are nowhere set forth in sworn pleading.

Although approximately 350 appellants are named, the record contains no affidavits or other sworn allegations describing their individual status as police officers or as candidates for sergeant. (We note that a considerably smaller number filed objections to the settlement.)

Because the requirements for intervention as a party have been ignored, the people pursuing this appeal have no more standing than individuals selected at random from a telephone book. Cf. **Kentucky Home Mutual Life Insurance Co. v Duling,** 190 F.2d 797,803 (6th Cir. 1951) (holding intervention petition insufficient under Rule 24(c) when it did not state cause of action against defendant but merely stated that intervenors had insurance under the group

policy in question0. Other individual police officers and white ethnic socities, the Schneider Intervenors, intervened as parties and vigorously pursued their interests. We perceive no reason why appellants could not have done the same.

Consequently, appellants lack standing to prosecute this appeal, and we have no jurisdiction. We therefore dismiss the appeal. We deny appellees' motion for sanctions under Fed. R. App. Pl. 38. We note, however, that any doubts as to the means by which objectors to class settlements should proceed in the future has been eliminated by this opinion.

---Footnotes

1. The case filed by the Hispanic Society was **Hispanic Society v New York**

City Police Dep't. No. 84-6628 (S.D.N.Y., filed Sept. 14, 1984) and the action filed by the Guardians Association was **Guardians Ass'n v. New York City Police Dep't,** No. 84-8504 (S.D.N.Y. filed Nov. 26, 1984). The two actions were consolidated in 1986 when the court approved the settlement. see **infra.**

2. The examination had two components, a written technical knowledge test and a video job sample test. The entire exam could not be used to rank the minority candidates because video equipment had been defective at some testing locations.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

THE HISPANIC SOCIETY OF THE NEW YORK CITY POLICE DEPARTMENT

-Against-

THE NEW YORK CITY POLICE DEPARTMENT

84 CIV. 6628 (RLC)

Carter, District Judge

The Hispanic Society and named individuals instuted 84 Civ. 6628 (RLC) in Sepember 1084; the Guardians Association and named individuals commenced 84 Civ 8508 (RLC) in November, 1984. The defendants in both cases are the New York City Police Department, Department of Personnel and various other officials. The complaints allege that Examination #2548 for Sergeants in the Police Departmen violated Title VII

because it had disparate impact on Hispanic and black candidates taking the test and was not job related. The court granted the motions of the Sergeants' Benevolent Association ("SBA"), the Sergeants' Elegible Association ("SEA") and organizatins and individuals represented by Peter Schneider, Esq. to intervene as parties in the litigation.

On June 14, 10985, the court certified 84 Civ. 6628 as a class action under Rule 23(a) and Rule 23(b) (2), F.R.Civ P., the class consisting of all Hispanic candidates for sergeant who took Examination # 2548. The court now certifies 84 Civ. 8508 as a class action, consisting of all black candidates who took the examination. The court also certifies as a class the members of the SEA consisting of provisional Sergeants

who were promoted on or before December 28, 1984. The Rule 23(a) requirements of numerosity, typicality, and commonality of questions of law and fact, and insurance of adequate and fair reprresentation of class interests, and Rule 23 (b) (2) requirements that the defendants' action is applicable to the entire class, warranting relief for the class as a whole are met in 84 Civ 8508. As to the SEA class, it meets allrequirements of Rule 23(a) as indicated above and Rule 23 (bb) (1) (A) since the prosecution of separate actions by or against individual members of the class would create the rise of inconsistent or varying adjjudications.

Examination #2548 was The test had a technical knowledge component and a job sample component the latter of which was

administered on video. At some examination sites, technical problems interfered with the successful completion of the job sample part of the test. The defendants offered a make up job sample test in April, 1984 for those who had scored 61% correct on the technical knowledge portion of the test.

Some 11,899 candidates took the test of this group 79% were white, 12.3% were black and 8.7% were Hispanic. Defendants needed to fill approximately 1,000 openings in the Sergents ranks and established a qualifying score to secure that required number of successful candidates. Based on the examination results, defendants established a rank order eligibles list of 1,041 persons. The racial breakdown of the eligible list was 93.47% whit (973), 2.30% black (24)

and 4.23% Hispanic (44). Of the total number of persons taking the test only 8.95% were placed on the eligible list: 10.61% of the white applicants, 1.69% of the black applicants and 4.39% of the Hispanic applicants.

After the lawsuit was instituted, defendants agreed to consent not to make any permanent promotions from the eligible list pending final disposition of the case. However, interim orders were issued by the court enabling the defendants on or befoe December 28, 1984, to grant some 534 persons on the eligoible list provisional upgrading Sergeant. Among this grup were 506 (94.8%) white, 7 (1.37%) black and 21 (3.94%) Hispanic officers. Subsequently, additional interim orders were issued on November 27, 1985 which allowed the

provisional promotion of all applicants on the eligible list. Moreover, to alleviate the disparate racial and ethnic impact of the examination, a certain number of blacks and Hispanics not on the eligible list were given provisional promotion or a rank order basis. This scond group consisted of 366 white candidates, 126 black applicants and 81 Hispanic candidates. Thus, as of this date, all the white, black and Hispanic candidates who made the original eligible list hold provisional Sergeant status and approximately 100 black and 60 Hispanic police officers not on the original list were granted provisional promotion.

A shortage of Sergeants now exists on the police force. At one time there were 1400 vacancies. While the provisional appointments have helped fill

some of these vacancies, those officers in command of the police force are convicned that a larger numeber of provisional as opposed to permanent, Sergeants creates great morale and administrative problems on the police force. Currently there is a need for 2,825 police Sergeants. There are now2,431 Sergeants on he force and of this numer 1,107 are provisional appointees.

Apparantly because of the need for Sergeants with permanent rank, the defendants' concern that at trial they could not successfully carry out their burden of demonstrating Examination #2548 was job related, the atmosphere for a compromise settlement was creatted. The parties have agreed that Examination #2548 "has some psychometric utility and

that the results of the technical knowledge component of the exam can be used to rank order candidates for promotion to Wergeant so long as steps are taken to minimize or eliminate the potential discriminatory effects of the use of the exam results." Memorandum of Sergeants' benevolent Ass. at 7.

The proposed settlement provides for at least 1,000 permanent promotions to Sergeant from the eligible list developed from examination #2548. That list will be modified by adding the necessary number of black and Hispanic applicants so that the aggregate racial/ethnic composition of Sergent will be approximate to the racial/ethnic composition of the applicants who took the test. These additional applicants will be selected in rank order among

themselves based on their raw scores on the technical knowledge protion of the test.

All officers (white, black and Hispanic) on the eligible list will be promoted before any black and Hispanic officers are added to the list for promotion. Retroactive seniority in their permanent rank order will be accorded only to those Sergeants provisionally promoted on or before December 28, 1984, and to any black or Hispanic officer who would have been promoted if the terms of the proposed settlement consent decree had beeren in effect at the time fo the provisional promotions. Back pay will be granted to members of the plaintiff classes who would have been promoted at the time of the December 28, 1984 promotions if the consent decree had been

in effect.

On February 7, 1986, the proposed settlement was signed by the parties, and two of the intervening parties: the SEA and the SBA. The third group of intervenors represented by Peter Schneider did not sign the settlement agreement and at least some of that group object to it. The court gave preliminary approval to the settlement, ordered appropriate note to be sent to all members of the class, and scheduled a hearing for April 17, 1986. The notice provided that all objections to the proposed settlement were to be filed witht the court on or before April 3, 1986.

A number of objections were filed, but no objections came from any member of the two defined plaintiff classes.

Virtually all the objections have come from white officers who failed to qualify for placement on the eligible list and wo challnge the popriety of the settlement in not making provision for selecting them for promotion on the same terms as the settlement provides for the selection of blacks and Hispanics not on the eligible list for permanent promotion. At the April 17 hearing counsel for the defendants urged approval of the settlement which had been endorsed and approved bythe mayor. Class counsel, consel for SA and SEA made staements or filed memoranda urging appoval. Peter Schneider was not at the hearing. In his stead Benjamin Vinar, Esq. spoke on behalf of two individuals who had been permitted to intervene: Dennis Gallagher and Timothy McCarthy. The other

individuals whom Schneider had represented and who had been allowed to intervene apparantly no longer objected to the settlement. Viner was given until May 9, 1986, to calrify whom Schneider and he represented. As of the date of this writing, nothing has been filed giving the clear implication that the above named two individuals are the only individuals they represent who continue to object to the settlement. Ronald Podolsky, purporting to represent police officers with a mark equivalent to or higher than the beneficiaries of the settlement, spoke against the settlement.

DETERMINATION

A voluntary disposition of litigation is highly favored. **Newman v Stein,** 464 F.2d 689 (2d Cir.) cert. denied, 409 U>S> 1039 (1972). The court,

however, must satisfy itself that the settlement is fair, reasonable and adequately protects the interests of members of the class. **Marshall v Holiday Magic, Inc.**,550 F.2d 1173, 1178 (9th Cir. 1977); **Feder v Harrington,,** 58 F.R.D. 1971 (S.D.N.Y. 19720 (MacMahon, J.). In Title VII litigation voluntary settlements" [are the] preferred means of achieving Title VII's goal of eliminating employment discrimination [and] voluntary compromises of Title VII actions enjoy a presumption of validity. ..". Kirkland v New York State Department of Correctional Serices, 711 F.2d 1117, 1128-29 (2d Cir. 1983); cert denied, 465 U.S. 1005 (1984). While a court is not authorized to convert settlement proceedings into a trial on themerits, it is expected to make a

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sufficient exploration of the facts and circumstances surrounding the voluntary disposition of the case to be able to make a rational determnation concerning the settlement's propriety. **Plummer v Chemical Bank,** 668 F.2d 654, 658 (2d Cir. 1982).

Roughly 31 individual police officers filed timely objections. Ten officers filed objections out of time. Two officers objected to the video protions of Exmnation #2548 and tow officers filed statements indicating a lack of objection to the setlement. Since neither the individual officeers nor the societies filing objections were either members of the plaintiff casses or represented members of the plaintiff classes, their objections need not be accorded the weight required when

objections to a proposed calss settlement came from members of the calss on whose behalf the settlement is purportedly made. **Kirkland v New York State Department of Correctional Serices, supra.** 711 F.2d at 1126. This is so because in a Title VII settlement of an employment discrimination claim, "non minorities do not have a legally protected interest in the **mere** expectation of appointment[s] which could only be made pursuant opresumptively discriminatory employment practices. ... [The legal rights of non-minorityies generally are not adversely affected by **reasonable** and **lawful** race-conscious hiring or promotional remedies ...." ■■■ (emphasis in the original, citations omitted). The consent of various intervening officers and societies

therefore to the settlement are not required.

The settlement was reached through arms length negotiations. Counsel for the city, class counsel repredsenting the black and Hispanic applicants, and consel representing the SBA and SEA weere involved in negotiating the proposed settlement. Thus those responsible for protecting the general public interest, counsel for the collective bargaining representative of Sergeants on the New York City police force, counsel for the minority groups directly victimized by the disparate impact of Examination #2548, and counsel for those provisional Sergeants slated for permanent promotion negotiated and agreed upon the settlemtn terms as the best solution to accommodate the Public and individual interests

involved. the participation ofthese varied interests to the agreement brings a high degree of credibility an validity to the settlement.

There has been no claim of collusion among the parties. There has been sufficient discovery and pretrial preparation to enable class counsel to weigh the wwisdom of agreeing to a settlement against the chances of the class prevaiing if the mater proceeded to tria. The settlement avoids a lengthy and costly and since it is supported by a representative group of police officers, including the SEA, it is likly to be accepted with good grace within the plice department than a disposition imposed by the court.

The basic dissatisfaction with the settlement comes from those who object to

race concious remedies, but in the circumstances of this case, the law provides for just such remediation. (Lirkland)at 1130. A cusory look at the statistics, with Hispanic applicants obtaining a passing rate of at less than half the rate of whites, and blacks receiving a passig rato of 1/5 that of whites, shows a prima faci adverse discriminatory impact on those two minority groups sufficient to void the test and serves as sufficient predicate for settlement based on race conscious remedies. **Id.** Indeed, the settlement merely provides a remedy for eliminating this disparate impact..

The settlement protects the interest of those who passed the test and were placed on the eligible list while at the same time alleviating the disparate

impast the test inflicted on :minority members. Thus the settlement takes care of those affected groups. **Patterson vNewspaper & Mail Deliverers' Union,,** 514 F.2d 767, 773 (2d Cir. 1975).

Some of the objectors allege that they too shuld benefit by the settlement and be protected since they scored as high or higher tan some minority members being selecteed for promotion prusuant to the settlement. While such personal dissatisfaction with the agreement is understandable, there has been no showing of the test's disparate racial impact on any othe the white applicants who object to not being placed on the eligible list. Hence Title VII's requirement of remediation is not brought into play. **Berkman v City of New York,,** 705 F.2d 584, 597 n.15 (2d Cir. 19830. Here the

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settlemtn deals merely woith correction of the disparate impact of Examination #2548. Whether the settlement solutin is approved or disapproved, those white applicants who did not score high enough to be placed on the eligible list will have no viable claim to be added to the list and no legal basis for challenging their failure to qualify for promotion.

The settlement is approved.

IT IS SO ORDERED.

Dated: New York, New York, June 16, 1986

s/ ROBERT L. CARTER, USDJ.

Excerpts from the hearing on the Title VII settlement in the Hispanic and Guardians' case before Carter, USDJ, April 19, 1986.

***

Appearances:

***

p.2 Ronald Podolsky, Attorney for Evelyn Marino.

***

p.4 MR. PODOLSKY: Your Honor, I believe I have standing because I filed papers for responding police officers who are named -- who under the terms of the stipulation identified as defendants in this action, all city employees identified as defendants. These people that I represent feel that they have a position different than the Corporation

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Counsel.

***

p13THE COURT: Wait a minute, I want to canvas who is speaking? You are speaking for the proponents? MS. LEVITT: For the defendant proponents, right. THE COURT: who is speaking against it? Who is speaking against?****MR. PODOLSKY: Ronald Podolsky, in opposition to a motion to dismiss Marino against Ortiz, if it is on today, and also in opposition to the settlement in Hispanic. THE COURT: All I'll hear is oppositionto the settlement. Anyone else?***.

***

p30 MR. PODOLSKY: Your Honor, Rponald Podolsky representing responding police officers who have a mark equivalent to or higher than the beneficiaries of the proposed settlement who were promoted in

November. THE COURT: but who neveless were not given the rank of sergeant? MR. PODOLSKY: That is correct your Honor. It is our position that the beneficiaries of this stipulation have in fact passed the examination and did in fact deserve to be certified to the police Commissioner as having done so. Once that has been done, we have a situation where a significant group of police officers are being supervised by people who they outscored on the same com@petitive examination. i have cast all of my papers in this casse and in the Marino case on the ground that such a procedure violates equal protection of the laws which is a constitutional mandate superior to Title VII. Now, Title VII is not inconsistent in this situation with equal protection of the

laws for a number of reasons. First of all, every one deemed to have been discriminated against by this examination has been promoted or otherwised passed over, if not entitled for other reasons. So the discriminationn has been dealt wth insofar as any racial impact is concerned. Secondly there is not existing list at the present time, so no one will be displaced if what my suggestion is is adopted by this court. Third, there has been no new examination given and it is our projection that no new examination can be given until at least December because of a new filing by recently qualified police officers who have put three years in since the last test. And there is a period of time for filing, a period of time for study, sponsored by the police department.

There are approximately, I believe, close to 400 vacancies right now with 30 accuruing every month and it is going to go up to 60 in June or July. We would not be here to day if the original pass mark on this examination had been left as is, period. Everbody agrees with that. And the only reason we are here was because of a possible disproportionate racial impact when the dust settled. However the City came to the conclusion that there were certain nonjob related questions and it is our position that nonjo relatedness is an objectively ascertainable fact, it impacts on everyone, regardless of race, color or creed. Tjhe same difficulty of those questions was visited upon everyone who took that examination.

THE COURT: Please,please. The

problem we have with it, don't quote me and cite me something that is not the law. you are now making an argument, but that's no the law and you are a lawyer. That makes no sense. These people were dealing with what they regarded to be the regulation and rules which they were under Title VII. You are now making an argument that's contrary to the rules of law that govern decisions under Title VII. And I can't deal with that. You are expressing a personal opinion. I can't deal with that. I have to deal with what I understand the law to be and that's what all the argument has been up to now. You are arguing that Title VII law shuldn't be what it is. I don't know. Maybe you are right. MR. PODOLSKY: I beleieve I am, our Honor. THE COURTBut I don't want to hear about

that because I have to deal with the law. unfortunately, you ar not the Second Circuit and you are not the Supreme Court of the United States to wom I have to look to for guidance.*****. p.33.

****

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
APR 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1415
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

EVELYN MARINO, et al.,
Petitioners,

v.

JUAN U. ORTIZ, et al.,
Respondents.

and

WAYNE COSTELLO, et al.,
Petitioners,

v.

THE NEW YORK CITY POLICE DEPARTMENT, et al.,
Respondents.

JOINT BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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EDITOR'S NOTE:

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April 24, 1987

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Whether a non-party with no entitlement to promotion may appeal from a consent decree resolving a Title VII challenge to a promotional examination?

2. Whether persons interested in Title VII litigation may bring a collateral attack on the proposed consent decree instead of intervening in the litigation when they have notice of the Title VII litigation, specific advice to intervene, and the collateral complaint is filed almost six months before approval of the consent decree?

3. Whether the plaintiffs, who cannot be granted the relief they request, have standing to bring a collateral attack?

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JOINT BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

COUNTER-STATEMENT OF THE CASE

1. The Hispanic Society Litigation

In 1983, the New York City Police Department gave a promotional examination

for the rank of sergeant (H230).[1] The examination had a disparate impact on black and Hispanic test takers (H45-46). Although the test takers were 79% white, 12.3% black and 8.7% Hispanic, the resulting eligible list was 93.47% white, 2.30% black and 4.23% Hispanic (H230).

Plaintiffs, black and Hispanic test takers, sued New York City alleging the sergeant's examination and eligible list were racially discriminatory (H229). Three groups intervened in the lawsuit: various white ethnic societies and individual officers (the "Schneider intervenors") (H137); the Sergeants Eligibles Association representing persons on the eligible list (H51-52); and the Sergeants Benevolent Association,

---

[1] "H" numbers refer to the Hispanic Society Joint Appendix. "M" numbers refer to the Marino Appendix. "A" numbers refer to petitioners' appendix.

representing persons who had been provisionally appointed to the rank of sergeant off the eligible list (H51).

After extensive discovery, the City determined that it was unlikely it could successfully defend the lawsuit by proving the examination was job related (H91-93). However, the City had a severe and growing shortage of sergeants and urgently needed to appoint new sergeants (H93). The City therefore decided to negotiate a settlement that would allow it to appoint sergeants without creating a disparate inpact on black and Hispanic test takers (id.).

All the parties except the Schneider intervenors then reached a settlement. The settlement provided that the police officers on the eligible list would be promoted to sergeant (H52). In addition, black and Hispanic officers not on the list would be promoted in rank order within their ethnic

group based on their test scores[2] so that the percentage of blacks and Hispanics promoted would be equivalent to the percentage of blacks and Hispanics taking the test (H52-55). The settlement affected only promotions made from the current eligible list (H52).

An interim order providing for provisional promotions along the lines of the proposed settlement was filed in November 1985 (H32). Notice of the proposed settlement was sent to all plaintiffs and intervenors and posted in all New York City Police Department precincts (H59). The hearing on the settlement was held in April 1986 (H193).

The Schneider intervenors were the only party to oppose the settlement (H137).

---

[2]The parties agreed the examination had some psychometric utility (H47).

Some of the petitioners also filed objections to the settlement as non-party objectors.[3]

In their request for modification and at the hearing, petitioners argued that although they were not on the eligible list and therefore were ineligible for promotion, they had test scores equal to or higher than some of the minority officers who were beneficiaries of the settlement (H175). They asserted that the Equal Protection Clause required their promotion too if the beneficiaries of the settlement were promoted (Id.).

The settlement was approved by order filed June 16, 1986 (H227).

---

[3]The notice of appeal in Hispanic Society listed 127 group members who had not objected to the consent decree (H169, 261).

2. The Decisions Below in Hispanic Society

The District Court approved the settlement after finding that the examination had a prima facie disparate impact on black and Hispanic test takers. The Court stated that the disparate impact was "a sufficient predicate for settlement based on race-conscious remedies" (H237).

The Court rejected petitioners' argument (H237-38):

> Whether the settlement solution is approved or disapproved, those white applicants who did not score high enough to be placed on the eligible list will have no viable claim to [be] added to the list and no legal basis for challenging their failure to qualify for promotion.

The Court of Appeals for the Second Circuit unanimously dismissed petitioners' appeal. The Court held, relying on United States ex rel. Louisiana v. Jack, 244 U.S. 397 (1917), that because petitioners never intervened and were not parties, they could not appeal the District Court judgment

(A66). The Court noted, citing Bender v. Williamsport Area School District, ___U.S.___, 106 S. Ct. 1326 (1986), that because petitioners did not intervene, the Court had before it no record from which it could evaluate their claim (A76-7):

> The present appeal ... is based on factual assertions that are nowhere set forth in sworn pleading .... Because the requirements for intervention as a party have been ignored, the people pursuing this appeal have no more standing than individuals selected at random from a telephone book .... Other individual police officers and white ethnic societies ... intervened as parties and vigorously pursued their interests. We perceive no reason why appellants could not have done the same.

3. The Marino Litigation

The Marino complaint was served on December 30, 1985, after approval of the interim order in Hispanic Society but before entry of the consent decree (M15). The complaint, filed on behalf of a group substantially similar to the Hispanic Society

objectors alleges that the plaintiffs are police officers who were not on the eligible list but had received scores equal to or higher than some of the minorities given provisional promotions pursuant to the interim order (M6). Plaintiffs argued that once the beneficiaries of the settlement were promoted, the Equal Protection clause required that plaintiffs be promoted too (M10).

Defendants moved to dismiss, arguing that plaintiffs should either intervene in the Hispanic Society litigation or file objections to the proposed settlement (M15). The District Court granted defendants' motion to dismiss on April 24, 1986 (M53).

4. The Decisions Below in Marino

The District Court dismissed the Marino complaint, citing Prate v. Freedman, 430 F. Supp. 1373 (W.D.N.Y.) aff'd 573 F.2d 1294 (2d Cir. 1977), cert denied, 436 U.S. 922

(1978), as an impermissible collateral attack on a Title VII consent decree (M53).

The Court of Appeals unanimously affirmed the dismissal finding that the "salutory policies" behind the rule barring collateral attacks on Title VII consent decrees were "squarely implicated" by the lawsuit. The Court held that the relief requested "would destroy the settlement by recreating the adverse racial impact that brought on the Hispanic Society litigation...." 806 F.2d at 1147.

The Court found that petitioners had been advised to intervene in the Hispanic Society litigation and that such a motion could have been timely (A12):

> Attempting intervention in Hispanic Society was obviously available to appellants when they commenced this action, since the final consent decree in that litigation had not yet issued.

Moreover, petitioners had "actually presented their claims at the objector hearing...." 806 F.2d at 1147. In these circumstances, the Court stated that petitioners' time to present their claim "has necessarily run" Id.

REASONS FOR DENYING THE WRIT

POINT I

THE DECISION IN HISPANIC SOCIETY FOLLOWED THE WELL SETTLED RULE THAT ONLY A PARTY OF RECORD MAY APPEAL FROM A DISTRICT COURT JUDGMENT.

It has been settled law for well over a century that "only a party of record in a lawsuit has standing to appeal from a judgment of the district court." Hispanic Society v. New York City Police Department, 806 F.2d 1147, 1152 (2d Cir. 1986). See, e.g., Bayard v. Lombard, 9 How. 530 (1850); Payne v. Niles, 20 How. 219 (1857); United States ex rel. Louisiana v. Jack, 244 U.S. 397, 402 (1917).

The exception allowing an appeal when the nonparty has an interest affected by the District Court judgment, see Martin-Trigona v. Shiff, 702 F.2d 380, 385 (2d Cir. 1983), is inapplicable to petitioners' situation. As the Court below stated:

> [A]ppellants were not on the original eligible list, they have no right to promotion under state law, and they do not allege that the examination discriminated against them. Even if the settlement were invalidated, therefore, they would not be entitled to promotion.

Hispanic Society, supra, 806 F.2d at 1152. Because petitioners have no entitlement to promotion, "they cannot appeal from the settlement as nonparties with an interest in the order below." Id.

Petitioners' lack of entitlement to promotion also defeats their contention that they should have been joined under Fed. R.

Civ. P. 19 or 20. (Pet. at 24, 26).[4] Compare English v. Seaboard Coast Line R.R., 465 F.2d 43, 46 (5th Cir. 1972) (joinder appropriate where nonminority employees' seniority rights would have been compromised); Bremer v. St. Louis S.R.R., 310 F. Supp. 1333, 1339 (E.D. Mo. 1969) (joinder appropriate where nonminority employee could lose his job). Here, by contrast, petitioners' privileges of employment were not threatened by the consent decree.

Moreover, because petitioners never assumed party status, there is no factual record on their claims. See Bender v. Williamsport Area School District, ___U.S.___, 106 S. Ct. 1326, 1334-35 (1986). Petitioners have submitted neither sworn

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[4]Petitioners did not raise this argument in either Court below.

pleadings nor affidavits describing their injury. In the words of the Court below, absent such a record "the people pursuing this appeal have no more standing than individuals selected at random from a telephone book." Hispanic Society, supra, 806 F.2d at 1154. Thus, because petitioners were not a party in Hispanic Society, they lacked standing to appeal from the District Court judgment.

POINT II

THE UNIQUE FACTS OF THE MARINO LITIGATION MAKE THE CASE UNWORTHY OF THIS COURT'S REVIEW.

The unique facts of the Marino litigation make it inappropriate for review by this Court. Petitioners' collateral suit was dismissed before the Hispanic Society consent decree became a final judgment and at a time when petitioners' adversaries had invited petitioners to intervene. Petitioners'

collateral attack was therefore an entirely unnecessary and duplicative procedural maneuver. Moreover, petitioners can not be granted the relief they request and their claim must ultimately fail on the merits. Accordingly, this case does not merit review.

A. Petitioners' Collateral Attack Was Properly Dismissed Where They Could Have Made A Timely Motion To Intervene In Hispanic Society But Deliberately Chose Not To.

The Court below affirmed the dismissal of the Marino complaint on the ground that "collateral attacks on consent decrees entered in Title VII actions are not permitted." Marino v. Ortiz, 806 F.2d 1144, 1146 (2d Cir. 1986). This rule has been adopted by every Circuit to confront the issue squarely. See Thaggard v. City of Jackson, 687 F.2d 66 (5th Cir. 1982), cert. denied sub nom. Ashley v. City of Jackson, 464 U.S. 900 (1983); Stotts v. Memphis Fire

Dep't., 679 F.2d 541 (6th Cir. 1982), rev'd on other grounds sub nom. Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984); Dennison v. City of Los Angeles Department of Water and Power, 658 F.2d 694 (9th Cir. 1981); O'Burn v. Shapp, 70 F.R.D. 549 (E.D. Pa. 1976), affd mem sub nom. Lutz v. Shapp, 546 F.2d 417 (3d Cir. 1976), cert. denied, 430 U.S. 968 (1977).

Other Circuits have also approved the rule. See Grann v. City of Madison, 738 F.2d 786, 796 (7th Cir.), cert. denied, 469 U.S.918 (1984); Culbreath v. Dukakis, 630 F.2d 15, 22 (1st Cir. 1980); See contra United States v. Jefferson County, 720 F.2d 1511, 1518 (11th Cir. 1983). Cf. Corley v. Jackson Police Department, 755 F.2d 1207, 1210 (5th Cir. 1985) (dicta questioning 5th Circuit's Thaggard rule).

The rule against collateral attacks on Title VII consent decrees prevents lawsuits that

> would raise the specter of inconsistent or contradictory proceedings, would promote continued uncertainty thus undermining the concept of a final judgment and would violate the policy of promoting settlement in Title VII actions.

Marino v. Ortiz, supra, 806 F.2d at 1146.

While these policies behind the collateral attack rule required dismissal of the Marino complaint, on the peculiar facts of this case petitioners are also equitably precluded from mounting a collateral attack. Petitioners could have made a timely motion to intervene in Hispanic Society. See, e.g., Dennison v. City of Los Angeles, supra, 658 F.2d at 696. The Hispanic Society consent decree did not issue until June 16, 1986. Petitioners were aware of the Hispanic Society lawsuit and the existence of their claim at least by December

1985 when the Marino complaint was filed. Compare Ashley v. City of Jackson, 464 U.S. 900, 902 (1983) (Rehnquist, J., dissenting from denial of certiorari) (petitioners were unaware of their claim until it was too late to intervene). As the Court below stated:

> Attempting intervention in Hispanic Society was obviously available to appellants when they commenced this action, since the final consent decree in that litigation had not yet issued.

Marino v. Ortiz, supra, 806 F.2d at 1147.

Moreover, when petitioners filed the Marino complaint the municipal respondents moved to dismiss on the ground, among others, that petitioners should instead move to intervene in Hispanic Society. Petitioners thus were aware of their claim almost six months before entry of the consent decree and had specific advice to intervene.

Further, as the Court below found, "[o]ther individual police officers and white

ethnic societies ... intervened as parties and vigorously pursued their interests." Hispanic Society, supra 806 F.2d at 1154. In these circumstances, petitioners could not have believed that a motion to intervene would have been futile. If petitioners were "unjustly denied their day in court" (Pet. at 24), the denial is entirely a result of their own procedural choices.

In any event, petitioners were not denied their day in court. Petitioners "actually presented their claims at the objector hearing in [Hispanic Society]." Marino v. Ortiz, supra 806 F.2d at 1147. The District Court considered and responded to their claims (H237-38); if petitioners had actually intervened they would have been entitled to no more. See Local No. 93 v.

City of Cleveland, __U.S.__, 106 S. Ct. 3063, 3079 (1986).[5]

Petitioners' reliance on Chase National Bank v. Norwalk, 291 U.S. 431 (1934) (Pet. at 25-26, 32), is misplaced because Chase did not "raise the specter of inconsistent or contradictory proceedings ... thus undermining the concept of a final judgment...." Marino v. Ortiz, supra 806 F.2d at 1146. These policies behind the rule barring collateral attacks on Title VII consent decrees were not implicated by Chase, a non-Title VII case, where the defendant was not a party to the prior litigation and thus was not bound by a prior

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[5]It could also be argued that the Schneider intervenors adequately represented petitioners' interests, especially when considered together with petitioners' appearance at the objector hearing. See Wright & Miller, Federal Practice & Procedure §4454 (preclusion by actual representation), §4457 (preclusion by virtual representation).

Court judgment. See Chase, supra, 291 U.S. at 437-38.

Moreover, petitioners' argument that they need not have intervened ignores the peculiar facts of this case. As this Court suggested thirty years after its decision in Chase, when a nonparty was aware of litigation but "purposely bypassed an adequate opportunity to intervene", the nonparty can be estopped from bringing a collateral attack. See Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 114 (1968). See also National Wildlife Federation v. Gorsuch, 744 F.2d 963, 969 (3d Cir. 1984) ("An unjustified or unreasonable failure to intervene can serve to bar a later collateral attack ...."); Safir v. Dole, 718 F.2d 475, 483 (D.C. Cir. 1983), cert. denied, 467 U.S. 1206 (1984).

Even Consumers Union of the United States, Inc. v. Consumer Product Safety

Commission, 590 F.2d 1209 (D.C. Cir. 1978), rev'd on other grounds sub nom. GTE Sylvania, Inc. v. Consumers Union, 445 U.S. 375 (1980), which petitioners rely on, recognized that mandatory intervention could be applied to persons in petitioners' position. Consumers Union, supra, 590 F.2d at 1222 n.64 (application "only where the putative intervenor had timely notice of the litigation.").

Further, as petitioners necessarily concede, the harm they allege is limited to the short life of the current promotional list (Pet. at 28-29). Compare Ashley v. City of Jackson, supra, 464 U.S. at 901 (consent decree established goals for future promotions); United States v. Jefferson County, supra, 720 F.2d at 1515 (consent decree established goals for future hiring). Thus petitioners will "remain eligible to compete for the available promotions" once a

new examination is offered. United States v. Paradise, 55 U.S.L.W. 4211, 4221 (1987) (Powell, J., concurring).

Finally, the Title VII preference for voluntary compliance argues in favor of barring a subsequent suit by employees who were aware of the Title VII litigation in time to intervene and were specifically advised to intervene but chose instead to bring a collateral attack. See Wygant v. Jackson Board of Education, __U.S.__, 106 S. Ct. 1842, 1855 (1986) (O'Connor, J. concurring) ("The value of voluntary compliance is doubly important when it is a public employer that acts ...."); Johnson v. Transportation Agency, 55 U.S.L.W. 4379, 4383 (1987) (construing Title VII so as not to require the employer to invite litigation before adopting affirmative action plan).

B. Even If A Collateral Attack Were Appropriate, Review By This Court Would Not Be Warranted Because Petitioners Cannot Be Granted The Relief They Request And Their Claim Is Meritless.

The Marino complaint seeks an order requiring petitioners' promotion (M10-11). They cannot obtain that relief. Even if the consent decree were found unconstitutional, petitioners would remain ineligible for promotion. Moreover, if the promotions made pursuant to the consent decree were rescinded, according to petitioners' own theory they would no longer have a right to promotion because no similarly situated minorities would have been promoted. Therefore, the consent decree has not done petitioners a "specific and palpable harm" and they lack standing. Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 45 n.25 (1976). See also Doherty v. Rutgers School of Law-Newark, 651 F.2d 893, 899-902 (3d Cir. 1981); Donnelly v.

Boston College, 558 F.2d 634 (1st Cir.), cert. denied, 434 U.S. 987 (1977).

Because petitioners were not on the eligible list, they have no right to promotion under state law. Their reliance on the New York State Constitution (Pet. at 30-32), is baseless. See, e.g., Cassidy v. Municipal Civil Service Commission, 37 N.Y.2d 526, 529 (1975). Nor do they have a right to promotion under federal law, because they do not claim the examination or eligible list discriminated against them. Hispanic Society, supra, 806 F.2d at 1152.[6] The

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[6]Petitioners did not argue below, and they do not argue here, that destruction of the consent decree could benefit them in any other way. Even if they were to make such an argument they would still lack standing because they must speculate that (1) they will take another promotional exam, (2) they will score well enough to become eligible for promotion, and (3) due solely to the consent decree adequate openings for the position of sergeant are unavailable. Because
(Footnote Continued)

consent decree gives them no right to promotion because they do not claim the examination discriminated against them.

In any event, the Marino complaint is meritless. The consent decree merely provides for interim relief to allow New York City to meet its critical shortage of sergeants by making appointments that do not have a disparate impact on black or Hispanic test takers. The consent decree only benefits police officers who took the examination and it will expire once a new promotional examination is offered. Short term interim relief of this type is clearly proper. See, e.g., Kirkland v. New York State Dept. of Correctional Services, 711

(Footnote Continued)
petitioners concede that hundreds of vacancies accrue each year (M8), "this unadorned speculation will not suffice to invoke the judicial power." Simon v. Eastern Kentucky Welfare Rights Organization, supra, 426 U.S. at 44.

F.2d 1117, 1134 (2d Cir. 1983), cert. denied 465 U.S. 1005 (1984).

Even when judged against the stricter standards applicable to affirmative relief, the consent decree is proper. The disparate impact of the promotional exam made out a prima facie Title VII case, which justifies race conscious relief. United Steel Workers of America v. Weber, 443 U.S. 193, 197 (1979); Johnson v. Transportation Agency, 55 U.S.L.W. 4379, 4384 (1987); Id. at 4399 (O'Connor, J. concurring).

The scope of the decree is properly restricted since it will do no more than correct the disparate impact of the promotional exam. See Johnson v. Transportation Agency, supra, 55 U.S.L.W. at 4384-85; United Steelworkers of America v. Weber, supra, 443 U.S. at 199. The decree did not unnecessarily trammel petitioners' rights because they had no

expectation of promotion. Compare Johnson v. Transportation Agency, supra, 55 U.S.L.W. at 4385 (worker passed over for promotion had no "absolute entitlement" to promotion). Thus, further review of this case is pointless because petitioners must ultimately lose on the merits of their claim.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

April 24, 1987

Respectfully submitted,

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April 24, 1987

REPLY BRIEF

(3)

Supreme Court, U.S.
FILED
APR 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1415

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

EVELYN MARINO, et. al,
Petitioners,

v.

JUAN U. ORTIZ, et al,
Respondents

and

WAYNE COSTELLO, et al,
Petitioners,

v.

THE NEW YORK CITY POLICE DEPARTMENT, et al.,
Respondents.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITIONER'S REPLY BRIEF

Ronald Podolsky, Esquire
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REPLY BRIEF

Petitioners respectfully file this brief in reply to the opposing joint brief of the respondents.

STATEMENT

Respondents in their opposing brief make several statements which are not in accord with the record. Thus for example on on page 12, footnote 6, the assertion that the petitioners did not raise in any court below the argument that the petitioners were necessary parties, is incorrect. In the 2d Circuit, in response to papers of the Sergeant's Benevolent Association Respondent seeking dismissal of the appeal the Petitioners asserted:

> "12. In the event the Court wishes to go forward on the Walker motion, substantively it should be denied because the Costello appellants were defined as defendants in the order, signed by the other parties, i.e. employees of New York City. They are not remote to the

litigation in that they are Police Officers who took the subject exam, had a grade equivalent to or higher than the theretofore promoted beneficiaries of the Settlement. Under Art. V. Sec. 6 of the N.Y. Constitution, having outcompeted those canddates, they had a right to be certified. As they are being required to subordinate that right to the settlement, they are directly being required to do something by reason of their exclusion by racial criterion. (Cf. Local Cleveland Firefighter, US (July, 1986).

13. It would appear that since they are to forego their state constitutional right and equal protection of the laws, they thereby became NECESSARY parties, and the failure to join them would render the settlement void. This is still an additional argument to deny both motions. if they are not defendants by reason of the clear definition in the order, then they are Necessary Parties, who, in order to be bound were required to be impleaded by the other parties seeking to effect the settlement." (pp, A3-4 infra.)

It should be noted that the word NECESSARY was capitalized in the original

document submitted to the 2d Circuit. The full text thereof is reproduced in the supplementary appendix hereto.

Further, on page 24, footnote 6 is the intimation that the Petitioners were attempting to destroy the consent decree by somehow causing the demotion of the minority beneficiaries of the settlement. Respondents know full well that Petitioners asserted below that "...Petitioners contend that previously promoted persons have shown their merit and fitness, and contrary to the assertions of the defendants the plaintiffs are not seeking to undo the promotions..." (A-44) Further, at A47-A48 petitioners asserted, "...Defendants are engaging in racially insulting behavior if they seek to imply that those previously promoted candidates did not in fact demonstrate their merit

and their fitness for the position for which they competed..." Further at the objector hearing, counsel for Petitioners specifically stated, "...It is our position that the beneficiaries of theis stipulation have in fact passed the examination and did in fact deserve to be certified to the police commissioner as haoving done so..." (A102)

ARGUMENT

It is Petitioners' contention that once the discriminination is rectified, the majority candidates with equivalent or higher grades need not be excluded on the basis of race from existing vacancies and sucn other vacancies which accrue until a new list as a result of a later examintion is established. Further, the Respondent's own discussion on pp. 14 and 15 of their brief show a conflict between circuits in the mandatory intervention

versus compulsory joinder requirements. This is illustrated by Respondents' **See contra** designation in their citation on p. 15 of their brief. Moreover there is no discussion on how the same judge hearing the two cases at the same time, in the same court, respecting the same issues, would reach an inconsistent decision with himself, or how the alleged collateral attack can be such if no judgment had as yet been entered. None of the perceived consequences of collateral attack are present in this case. The issues should be determined on their merits.

CONCLUSION

The petition should be granted.

Dated: April 26, 1987.

Respectfully submitted:

RONALD PODOLSKY
Attorney for Petitioners.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HISPANIC SOCIETY

v.

THE CITY OF NEW YORK,
APPELLEES

and

WAYNE COSTELLO, ET AL.,

APPELLANTS.

---

1. Ronald Podolsky, attorney for appellants is currently in Austria. The trip with his family began July 13, and was to end August 24, 1986. Tickets were purchased in February.

2. Two days before leaving the scheduling order was received, with pre argument conference 23 July and briefs of appellant by 15 August 1986.

3. This required me to return July 22 leaving my wife and 6 year old daughter in Europe. I have completed and filed the briefs.

4. At pre argument conference, I specifically told all counsel that I was

returning to Austria (where my in laws live), and to please make any motions before I left or after I returned, giving them the dates.

5. The motion by Hispanic Society was received and noticed for Aug 12, but postponed by the court for August 26. Other parties submitted supporting papers and I prepared opposing papers.

6. On my way to the airport 12 Aug. I learned that Mr. Walker called from Washington. I returned the call. I was told by a secretary that Mr. Walker, who was at the pre argument conference, and knew full well I was leaving, was making a motion to dismiss. The same motion made by Hispanic, returnable 26 August.

7. I am a single practitioner with no employees or professional associates.

8. In request that Mr. Walker's motion be treated as papers in support of Hispanic mootion to dismiss, rather than as a duplicitious motion.

9 In the event this is inappropriate, I request that my answering papers to Hispanic motion be deemed in opposition to the Walker motion as well, as no default is intended.

10. If either option is deemed inappropriate by the court, it is requested that the Walker motion be adjourned for one week. No prior application has been made, and I have not yet read the papers.

11. I wish to express my disdain for the apparantly intentional timing of the Walker motion, notification of my trip having been specifically made known to him and all other counsel.

12. In the event the courtyt wishes to go forward on the Walker motion, substantively it should be denied because the Costello appellants were defined as defendants in the order, signed by the other parties, i.e. employees of New York City. They are not remote to the

litigation in that they are police officers who took the subject exam, had a grade equivalent to or higher thant the theretofore promoted beneficiaries of the settlement. Under Art. V, Sec. 6 of N.Y. Constitution, having outcompeted those candidates, they had a right to be certified. As they are being required to subordinate that right to the settlement, they are directly being required to do something by reason of their exclusion by reacial criterion. (Cf. Local Cleveland Firefighter, U.S. July, 1986)

13. It would appear that since they are to forego their state constitutional right and equal protection of the laws, they thereby became NECESSARY parties, and the failure tto join them would render the settlement void. This is still an additional argument to deny the both motions. If they are not defendants by reason of the clear deficition in the

order, then they are Necessary Parties, who, in order to be bound, were required to be impleaded by the other parties seeking to effect the settlement.

By reason whereof, both motions should be denied. I have requested Mr. Joel Post, an attorney who shares officesbut who is not professionally associated, to file four copies with the court and serve each of the seven other attorneys. I request the court to overlook the format hereof, but I have no facilities here.

Certified true under penalty of perjury:

Respectfully submitted:

RONALD PODOLSKY

JOINT

APPENDIX

Supreme Court, U.S.
FILED
JUL 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

86-1415

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

EVELYN MARINO, et al,
Petitioners

v.

JUAN U. ORTIZ, et al.,
Respondents

and

WAYNE COSTELLO, et al.,
Petitioners

v

THE NEW YORK CITY POLICE DEPARTMENT, et al.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED FEBRUARY 28, 1986
CERTIORARI GRANTED MAY 18, 1986

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EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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2. Petition Appendix

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Relevant Docket Entries-

Marino et al. v Ortiz, et al. USDC, SDNY
U.S. Dist. Court, So. Dist. N.Y.
DOCKET NO. 85 CIV. 10068 (RLC)

12-30-85 (1) Filed Complaint.

2-3-86 (3) Filed notice of Reassignment to Judge Carter as of 1-31-86.

2-5-86 (4) Filed Defendants' declaration Notice of motion for an order dismissing action.

2-24-86 (6) Filed notice of Ronald Podolsky in opposition & supporting plaintiff motion for summary judgment.

4-25-86 (--) File Memo Endorsed on #4. Motion granted. Clerk to enter judgment.

4-29-86 (7) Filed judgment that the complaint is dismissed.

5-5-86 (8) Filed plaintiffs Notice of Appeal to USCA 2d Circuit from the Memo Endorsement granting defendants' motion & the judgment dated 4-29-86.

6-11-86 (10) Filed True copy of mandate Order from the USCA 2d Cir. appeal is withdrawn w/o costs & w/o attorney fees & w/o prejudice..So Order, Clerk, USCA 2d Cir.

6-23-86 (12) Filed Plff's revised Notice of Motion for an Order for relief from judgment order dismissing complaint.

7-10-86 (--) Filed Memo Endorsed on #12. motion denied .. So Ordered .. Carter, J.

Court of Appeals: 86-7347

7-11-86 Appellant Marino et al., Notice of Reinstatement filed.

7-24-86 ORDER consolidating FOR PPURPOSE OF ARGUMENT ONLY docket numbers 86-7347 and 86-7507 FILED. (Also filed in 86-7507)

10-16-86 Case heard before Feinberg, Chief Judge, Winter, Mahoney, C.JJ.

12-8-86 JUDGEMENT AFFIRMED, Published Signed Opinion filed.

3-13-87 NOTICE OF FILING of petition for writ of certiorari on FEB. 20, 19887 by petitioners EVELYN MARINO, ET AL, supreme crurt docket no 86-1415 FILED.

Hispanic Society Relevant Docket Entries,
U.S. Dist. Court. So. Dist. N.Y.
USDC, SDNY INDEX 84-6628 (RLC)

9-14-84 (1) Filed complaint Issued Summons & Notice.

10-2-84 (3) Filed Notice of Assignment to Judge Carter.

11-29-84 (4) Filed notice of motion of Robert Hyman, [& others omitted].. Emerald Society of the Police Dept. of NYC, Columbian Association of the NYCPD, Shomrin Society of the NYCPD, St. Paul Society of the NYCPD and Steuben Assoc. of the PD of the City of NY to intervene as party defts.

1-15-85 Filed memo endorsement on #4. Motion granted. CARTER, J.

1-28-85 (7) filed deft's ANSWER to the complaint.

1-31 85 (8) Filed intervenor / deft's ANSWER to the complaint.

1-16-85 (10) Filed motiion of Francis

Shields [& others omitted herein] & Peter Manon, as President of the Sergeants Benevolent Assoc. of the City of New Yotrk for an order premitting forenamed individuals to intervene as defts.

5-8-85 (14) Filed Plffs' Affidavit of Kenneth Kmmerling & Notice of Motion for class certification purs. to Rule 23(a) and (b)(2).

6-14-85 (--) Filed Memo Endorsement on #14: Motion granted. Carter, J.

11-27-85 (19) Filed Interim Order that defts NYC Police & Dept of Personnel may promote to the rank of sergeants as many police officers as are in their judgmnet needed from the list and from other black & Hispanic PO who are ot on the list ... etc. as indicated. So Ordered, Carter, J.

2-10-86 (20) Filed Stip of Settlement & Order that 84 civ 6628 & 84 Civ 8504

are consolidated for purposes of settlement and any proceedings .. and the Guardians Assoc. is certified as a pltffs' class action .. etc. as indicated .. So Ordered, Carter, J.

2-10-86 (21) Filed Order that hearing be held on 4-17-86 .. etc. as indicated. So Ordered, Carter, J.

[3-20-86-4-9-86 documents 22 to 90 various letters respecting objector hearing].

3-28-86 (46) Filed Police Officers responding request for modification.

3-31-86 (47) Filed intervenor defts' objections to proposed settlement.

4-3-86 (75) Filed intervenor defts Hyman et al additional objections to proposed settlement.

4-15-86 (94) Filed intervenor def't Affirmatin of Raymond AAB in support of settlement.

4-17-86 (--) CLASS SETTLEMENT HEARING BEGUN & CONCLUDED dec. Res.

6-16-86 (107) Filed Opinion #59466 .. settlement is approved. So Ordered. Carer, J.

6-18-86 (109) Filed P. in Hispanic & Plaintiffs in Marino & Notice of Motion for an order for relief from judgt & Order approving settlement of case.

6-23-86 (110) Filed Transcript of record of proceedings dated 4-17-86.

6-25-86 (115) Filed objector respondng Police Officer intevenors AMENDED NOTICE OF APPEAL to the USCA 2d Cir. from the Order approving the setttlement dated 6116-86.

7-10-86 (--) Filed Memo Endorsed on # 109 .. motion denied .. so Ordered, Carter, J.

Court of Appeals 86-7507

7-24-86 ORDER CONSOLIDATING 86-7347 AND

88-7507 FOR THE PURPOSE OF APPEAL ONLY.

7-29-86 Appellee THE HISPANIC SOCIETY Notice pf motiion for dismissal of the appeal, damages, etc. filed.

8-18-86 Defendants Intervenors Motion for dismissal of appeeal and damages pursuant to Rule 38, FRAP filed. (Order)

8-20-86 Appellants opposing affirmation to motion for dismissal of appeal and damages filed.

8-28-86 Order denying without prejudice to renewal before the panal that hears the appeal, the motion for dismissal of the appeal and damages pursuant to Rule 38, FRAP filed (on motion[s]) 7-29-86 ***[& 8-18-86]

10-16-86 Case heard before Feinberg, Chief Judge, Winter, Mahoney, C.JJ.

12-8-86 DISMISSAL OF APPELLANT's appeal and denial of Appellee's motion

for sanction under FRAP 38 by published signed opinion per Judge Winter.

12-8-86 Judgment filed.

Guardians Association USDC, SDNY U.S. Dist. Court, So. Dist. N.Y. Docket No. 84-8504 (RLC).

11-26-84 (1) Filed Complaint Issued Summons & Notice.

12-5-86 (2) Filed NOTICE OF ASSIGNMENT to Judge Carter.

12-15-84 (3) Filed motion of Robert Hyman [& others named] to intervene as @artu defts.

1-15-85 (--) Filed memo endorsement on #3. Motion granted Carter, J.

1-28-85 (5) Filed deft's ANSWER to the complaint.

4-16-85 (7) Filed Motion of Francis Shields [& others] Peter Mahon as President of the Sergeants Benevolent Assoc of the City of New York an order

permitting forenamed individuals to intervene as defts.

5-17-85 (--) Filed memo endorsement on #8. Motion granted, Carter, J.

4-17-86 CLASS SETTLEMENT HEARING BEGUN & COMPLETED DEC. RES. CARTER, J.

6-25-86 Filed Objector Responding Police Officer Interfenors Notice of Appeal to USDC 2d Cir from order dtd 6-16-86.

Complaint

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE GUARDIANS ASSOCIATION OF THE POLICE DEPARTMENT OF THE CITY OF NEW YORK, INC. GREGORY S. WILLIAMS, ROBERT MCNAIR, and TIMOTHY PEARSON, individually and in bahalf of all those similarly situated

Plaintiffs,

v.

THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, THE DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK,.

Defendants.

Hereinafter: [Caption Omitted]

Later additions of parties noted in relevant docket entries.

Guardians Association Complaint

NATURE OF THE CASE AND JURISDICTION

1. This is a civil rights action challenging defendants' use of the results of examination #2548 for the selection of sergeants of the New York City Police Department, because it discriminates aganst black applicants and is not job-related. Plaintiffs seek delaratory and injunctive relief from the use of the rank ordered results of examination #2548, and such affirmative relief as is necessay to compensate black persons for defendants' pattern of present and past discrimination on the basis of race and color.

2. Jurisdiction is conferred on the Court by 42 USC Sec. 2000e-5(f). Plaintiffs have filed charges with the Equal Employment Opportunity Commission.

CLASS ALLEGATIONS

3. Plaintiffs sue on their own behalf and on behalf of a class of persons under Rule 23(a) and (b) (2) of the Federal Rules of Civil Procedure.

4. The class consists of: All blacks who took examination #2548 for the position of sergeant in the New York City Police Department and whho either failed the test or who passed the test but are too low down on the eligible list to be appointed to the position in the foreseeable future.

5. Named plainiffs are members of the class. The Guardians Associatio of the Police Department of the City of New York, Inc., is a membership organization which seeks to represent the interests of the class because of the injury to its members and the organization. The class is so numberous that joinder of all

members is impracticable. Approximately 11593 persons took examintion #2548; approximately 12.3% (1,420) of those were black. These plaintiffs will fairly and adequately protect the interest of the class. They are represented by attorneys experienced in employment discrimination class action litigation.

6. There are common questions of law and fact. These questions include: (a) wtherer examination #2548 has a discriminatory impact on blacks; (2) whether examination #254:8 has been pro@erly validated; and (3) whether the cut off score and ranking of candidates is justified.

7. The claims of plaintiffs are typical of the class claims.

8. The defendants have acted or refused to act on grounds gernerally applicable to the class thereby making

appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

PARTIES

9 Plaintiff the Guardians Association of the Police Department of the City of New York "Guardians" is an organization of black members of the NYCPD. It is devoted to the betterment of black police officetrs hgenerally and it has been concerned with the recruitment of additional black olice officers and the promotion of black police officers within the NYCPD. The discrimination caused and perpetuated by examination #2548 severely limits the ability of the Guardians to carry out its functions as an organization. The Guardians have filed EEOC charges on behalf of itself and on behalf of its members including plaintiffs Gregor S. Williams, Robert

McNair, Timothy Pearson.

10. Plaintiff Gregory S. Wiliams is black and took and failed Examination #2548

11. Plaintiff Robert McNair is black and took and failed Examination #2548

12. Plaitiff Timothy Pearson is black and took and failed Examination #2548.

13. Defendant Department of Personnel in the administrative agency of the Cit of New York whose personnel supervise the preparation and administration of promotional examinations for the NYCPD under the direction of the Personnel Director.

14. Defendant New York City Police Departmen ("NYCPD") helps determine the criteria to be used in selecting sergeants from the ranks of New York City police officers, and works in conjunction with the Department of Personnel in

preparing the examination.

FACTUAL ALLEGATIONS

DISCRIMINATORY IMPACT

15. Defendants gave examination #2548 on June 25, 1983 for the position of Police Sergeant. The examination had two components; a technical knowledge test with a passing score of 70.66% or 53 correct responses on 75 questions and a job sample test with a pass mark of 87.04% or 47 correct responses on 54 questions. A candidate had to pass both parts and the scores were weighted as follows: technical knowledge 36% and job sample 64%. Points for seniority, police department awards and veterans credits were added to the final score.

16. A total of 11,593 police officers took the examination -- 1420 were black. A total of 1,037 passed of whom 23 were black.

17. The pass rate for whites was 10.6% and it was 1.6% for blacks. The pass rate for whites is greater than 4/5 the pass rate for blacks. The difference is stastically significant.

18. The difference between hhe expected ratio of blacks who passed examination #2548 and the ratio of blacks who actually passed examination #2548 is 9.9 standard diviation. A difference greater than 2 or 3 standard deviations is statistically significant and constitutes a prima facie case of employment discrimination.

19. On information and belief, those blacks who passed scored less well than white test passers and are ranked disproportionately at the bottom of the raked eligible list. This disproportion is statisticaly significant.

NO TEST VALIDITY

20. Examination #2548 has not been properly validated and is not job related.

21. The lack of validity and job relatedness make the passing points and the use of ranked scores inappropriate.

CLAIM FOR RELIEF

22. As a result of the discriminatory practices set forth above, defendants have denied plaintiffs and the class they represent their right to equal employment opportunity in violation of the Civil Rights Act of 1964, 42 U.S.C Sec. 2003; the New York State Constitution Article 5, Sec. 6; and as a pendent state claim in violation of the New York State Human Rights Law (Article 15 of the Executive Law).

IRREPARABLE INJURY

23. Plaintiffs have no adequate remedy at law. Unless appointments to he

position of police sergeant are made in a nondiscriminatory fashion, plaintiffs and members of their class will be irreparably injured.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that this court:

(a) declare that defendants' use of exammination #2548 violates plaintiffs' rights to an equal employment opportunity in violation of the provisions set forth in the claim for relief.

(b) preliminarily and permanently enjoin defendants and those acting in concert with them from using the eligible list from examination #2548 to make appointments for the position of police sergeant;

(c) preliminarily and permanently enjoin defendants and those acting in concert with them to appoint black

persons as police sergeants in such numbers and with retroactive seniority and back pay as to compensate for a pattern of past and present discrimination;

(d) retain jurisdiction to ensure compliance with any order issued.

(e) award plaintiffs their reasonable costs, disbursements and attorneys' fees; and

(g) grant such other and further relief as may be proper.

Dated: New Rochelle, NY

October 11, 1984. (Endorsement omitted)

Complaint

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE HISPANIC SOCIETY OF THE CITY OF NEW YORK POLICE DEPARTMENT, INC., LUIS A. SALGADO, WILLIAM MORALES, MANUEL TORRES VALENTM NEVES, JR., Individually and on behalf of all those similarly situated

Plaintiffs,

v.

THE NEW YORK CITY POLICE DEPARTMENT, and THE DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK,

Defendants.

Hereinafter: [Caption Omitted]

Later additions of parties noted in relevant docket entries.

Hispanic Society Complaint

NATURE OF THE CASE AND JURISDICTION

1. This is a civil rights action challenging defendants' use of the results of examination #2548 for the selection of sergeants of the New York City Police Department, because it discriminates aganst Hispanic applicants and is not job-related. Plaintiffs seek delaratory and injunctive relief from the use of the rank ordered results of examination #2548, and such affirmative relief as is necessay to compensate Hispanic persons for defendants' pattern of present and past discrimination on the basis of race and color.

2. Jurisdiction is conferred on the Court by 42 USC Sec. 2000e-5(f). Plaintiffs have filed charges with the Equal Employment Opportunity Commission.

CLASS ALLEGATIONS

3. Plaintiffs sue on their own behalf and on behalf of a class of persons under Rule 23(a) and (b) (2) of the Federal Rules of Civil Procedure.

4. The class consists of: All Hispanics who took examination #2548 for the position of sergeant in the New York City Police Department and whho either failed the test or who passed the test but are too low down on the eligible list to be appointed to the position in the foreseeable future.

5. Named plainiffs are members of the class. The Hispanic Society of the New York City Police Department of the City of New York, Inc., is a membership organization which seeks to represent the interests of the class because of the injury to its members and the organization. The class is so numerous

that joinder of all members is impracticable. Approximately 11,593 persons took examintion #2548; approximately 8.65% (1,003) of those were Hispanic. These plaintiffs will fairly and adequately protect the interest of the class. They are represented by attorneys experienced in employment discrimination class action litigation.

6. There are common questions of law and fact. These questions include: (a) whether examination #2548 has a discriminatory impact on Hispanics; (2) whether examination #2548 has been properly validated; and (3) whether the cut off score and ranking of candidates is justified.

7. The claims of plaintiffs are typical of the class claims.

8. The defendants have acted or refused to act on grounds generally

applicable to the class thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

PARTIES

9. Plaintiff the Hispanic Society of the New York City Police Department, Inc., ("Hispanic Society") is an organization of Hispanic members of the NYCPD. It is devoted to the betterment of Hispanic police officers generally and it has been concerned with the recruitment of additional Hispanic police officers and the promotion of Hispanic police officers within the NYCPD. The discrimination caused and perpetuated by examination #2548 severely limits the ability of the Hispanic Society to carry out its functions as an organization. The Hispanic Society have filed EEOC charges on behalf of itself and on behalf

of its members including plaintiffs Luis A. Salgado, William Morales and Velentim Veves, Jr.

10. Plaintiff Luis A. Salgado is Hispanic and took and failed Examination #2548 with a score of 64.5.

11. Plaintiff William Morales is Hispanic and took and failed Examination #2548

12. Plaitiff Manuel Torres is Hispanic and took and failed Examination #2548.

13. Plaintiff Valentim Neves, Jr. Is Hispanic and took and passed examination #2548 with a score of 83.063.

14. Defendant Department of Personnel in the administrative agency of the City of New York whose personnel supervise the preparation and administration of promotional examinations for the NYCPD under the direction of the Personnel Director.

15. Defendant New York City Police Department ("NYCPD") helps determine the criteria to be used in selecting sergeants from the ranks of New York City police officers, and works in conjunction with the Department of Personnel in preparing the examination.

FACTUAL ALLEGATIONS

DISCRIMINATORY IMPACT

16. Defendants gave examination #2548 on June 25, 1983 for the position of Police Sergeant. The examination had two components; a technical knowledge test with a passing score of 70.66% or 53 correct responses on 75 questions and a job sample test with a pass mark of 87.04% or 47 correct responses on 54 questions. A candidate had to pass both parts and the scores were weighted as follows: technical knowledge 36% and job sample 64%. Points for seniority, police

department awards and veterans credits were added to the final score.

17. A total of 11,593 police officers took the examination -- 1003 were Hispanic. A total of 1,037 passed of whom 44 were Hispanic.

18. The pass rate for whites was 10.6% and it was 4.39% for Hispanics. The pass rate for whites is greater than 4/5 the pass rate for Hispanics. The difference is stastically significant.

19. On information and belief, those Hispanics who passed scored less well than white test passers and are ranked disproportionately at the bottom of the raked eligible list. This disproportion is statisticaly significant.

NO TEST VALIDITY

20. Examination #2548 has not been properly validated and is not job

related.

21. The lack of validity and job relatedness make the passing points and the use of ranked scores inappropriate.

CLAIM FOR RELIEF

22. As a result of the discriminatory practices set forth above, defendants have denied plaintiffs and the class they represent their right to equal employment opportunity in violation of the Civil Rights Act of 1964, 42 U.S.C Sec. 2003; the New York State Constitution Article 5, Sec. 6; and as a pendent state claim in violation of the New York State Human Rights Law (Article 15 of the Executive Law).

IRREPARABLE INJURY

23. Plaintiffs have no adequate remedy at law. Unless appointments to the position of police sergeant are made in a nondiscriminatory fashion,

plaintiffs and members of their class will be irreparably injured.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that this court:

(a) declare that defendants' use of examination #2548 violates plaintiffs' rights to an equal employment opportunity in violation of the provisions set forth in the claim for relief.

(b) preliminarily and permanently enjoin defendants and those acting in concert with them from using the eligible list from examination #2548 to make appointments for the position of police sergeant;

(c) preliminarily and permanently enjoin defendants and those acting in concert with them to appoint Hispanic persons as police sergeants in such numbers and with retroactive seniority

and back pay as to compensate for a pattern of past and present discrimination;

(d) retain jurisdiction to ensure compliance with any order issued.

(e) award plaintiffs their reasonable costs, disbursements and attorneys' fees; and

(g) grant such other and further relief as may be proper.

Dated: New York, New York
September 13, 1984. (Endorsement omitted)

Hispanic Society Answer
U.S. Dist. Court, So. Dist. N.Y.
[Caption Omitted] 84 Civ 6628 (RLC)

Defendants New York City Police Department and Department of Personnel of the City of New York, bytheir attorney Frederick A.O.Schwarz, Jr., Corporation Counsel of the City of New york, as and for their answer to the complaint herein allege as follows:

1. Deny each and every allegation contained in paragraph 1 of the complaint, except admit that plaintiffs purport to bring this action as a class action challenging the use of the results of Examination No. 2548 for he promotion of sergeants in the New York City Police Department.

2. Deny each and every allegation contained in paragraph 2, except admit that plaintiffs purport to predicate jurisdiction on the statute set forth

therein and that plaintiffs have filed certain charges with the Equal Employment Opportunity Commission

3. Deny each and every allgegation contained in paragraphs 3 and 4 of the complaint.

4. Deny each and every allegation contained in paragraph 5 of the complaint, except admit that approximately 11,593 persons took Examination No. 2548 and that appoximately 8.56% (1,003) were Hispanic.

5. Deny each and every allegation containedin paragraphs 6, 7, and 8 of the complain.

6. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 ofthe complaint, except deny the allegations contained in the third sentence of paragraph 9 and admit the

allegations contained in the fourth sentence of paragraph 9.

7. Admit, upon information and belief the truth of the allegations contained in paragraphs 10, 11, 12 and 13, except deny that plaintiff Valentim (sic) Neves's score on Examination No. 2548 was 83.063.

8. Admit the truth of the allegations contained in paragraph 14 of the complaint.

9. Deny each and every allegation contained in paragraph 15 of the complaint, except admit that defendant New York City Police Department cooperates with the New York City Department of Personnel in preparing examinations for the position of sergeant.

10. Admit the truth of the allegations contained in paragraph 16 of

the complaint.

11. Deny the allegations contained in paragraph 17 of the complaint, except admit that 11,593 police officers took the examination and that 1,003 were Hispanic.

12. Deny eacch and every allegation contained in paraggraphs 18, 19, 20, 21, 22 and 23 of the complaint.

FOR A FIRST DEFENSE TO THE COMPLAINT

13 Plaintiffs fail to state any claim upn which relief may be granted.

FOR A SECOND DEFENSE TO THE COMPLAINT

14. If it is found that Examination No. 2548 had a disparate impact upon Hispanic candidates, defendants allege that such result was not an unlawful practice on its part since it was based upon the results of professionally developed ability tests administered in good faith. The examination is directly

related to the job of sergeant in the New YorkCity Police Department. Moreover, neither the preparation or administration of said examination nor the action taken by defendants based on its results was designed, intended or used to discriminate on the basis of race, color, religion, sex or national origin.

FOR A THIRD DEFENSE TO THE COMPLAINT

15. The court lacks subject matter jurisdiction over the allegations set forth in the complaint.

FOR A FOURTH DEFENSE TO THE COMPLAINT

16. Those persons who successfully passed the examination No. 2548 and who are awaiting promotion based on its results are necessary and indispensable parties to this action as described in Federal Rule of Civil Procedure 19.

17. Plaintiffs have improperly failed to join such persons as parties to

this action, and the complaint must therefore be dismissed as a matter of law.

WHEREFORE, Defendants respectfully request that judgment be entered dismissing the complaint, with prejudice and awarding defendants the costs and disbursements incurred in this action.

Dated: New York, New York, January 23, 1985. [Endorsement omitted]

Guardian Answer
U.S. Dist. Court, So. Dist. N.Y.
[Caption Omitted] 84 Civ 6628 (RLC)

Defendants New York City Police Department and Department of Personnel of the City of New York, bytheir attorney Frederick A.O.Schwarz, Jr., Corporation Counsel of the City of New york, as and for their answer to the complaint herein allege as follows:

1. Deny each and every allegation contained in paragraph 1 of the complaint, except admit that plaintiffs purport to bring this action as a class action challenging the use of the results of Examination No. 2548 for he promotion of sergeants in the New York City Police Department.

2. Deny each and every allegation contained in paragraph 2, except admit that plaintiffs purport to predicate jurisdiction on the statute set forth

therein and that plaintiffs have filed certain charges with the Equal Employment Opportunity Commission

3. Deny each and every allgegation contained in paragraphs 3 and 4 of the complaint.

4. Deny each and every allegation contained in paragraph 5 of the complaint, except admit that approximately 11,593 persons took Examination No. 2548 and that appoximately 12.2% (1,420) of those were black.

5. Deny each and every allegation containedin paragraphs 6, 7, and 8 of the complain.

6. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 of the complaint, except deny the allegations contained in the third

sentence of paragraph 9 and admit that the Guardians Assocation filed certain EEOC charges on behalf of its members.

7. Admit, upon information and belief the truth of the allegations contained in paragraphs 10, 11, 12 of the complaint

8. Admit the truth of the allegations contained in paragraph 13 of the complaint.

9. Deny each and every allegation contained in paragraph 14 of the complaint, except admit that defendant New York City Police Department cooperates with the New York City Department of Personnel in preparing examinations for the position of sergeant.

10. Admit the truth of the allegations contained in paragraph 15 of the complaint.

11. Deny the allegations contained in paragraph 17 of the complaint, except admit that 11,593 police officers took the examination and that 1,420 were black.

12. Deny eacch and every allegation contained in paraggraphs 17, 18,19, 20, 21, 22 and 23 of the complaint.

FOR A FIRST DEFENSE TO THE COMPLAINT

13 Plaintiffs fail to state any claim upn which relief may be granted.

FOR A SECOND DEFENSE TO THE COMPLAINT

14. If it is found that Examination No. 2548 had a disparate impact upon black candidates, defendants allege that such result was not an unlawful practice on its part since it was based upon the results of professionally developed ability tests administered in good faith. The examination is directly related to the job of sergeant in the New YorkCity

Police Department. Moreover, neither the preparation or administration of said examination nor the action taken by defendants based on its results was designed, intended or used to discriminate on the basis of race, color, religion, sex or national origin.

FOR A THIRD DEFENSE TO THE COMPLAINT

15. The court lacks subject matter jurisdiction over the allegations set forth in the complaint.

FOR A FOURTH DEFENSE TO THE COMPLAINT

16. Those persons who successfully passed the examination No. 2548 and who are awaiting promotion based on its results are necessary and indispensable parties to this action as described in Federal Rule of Civil Procedure 19.

17. Plaintiffs have improperly failed to join such persons as parties to this action, and the complaint must

therefore be dismissed as a matter of law.

WHEREFORE, Defendants respectfully request that judgment be entered dismissing the complaint, with prejudice and awarding defendants the costs and disbursements incurred in this action.

Dated: New York, New York, January 23, 1985. [Endorsement omitted]

Joint Caption

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE HISPANIC SOCIETY, et al.,

Plaintiffs,

-against-

THE NEW YORK CITY POLICE DEPARTMENT, et al,

Defendants.

-and-

FRANCIS SHIELDS, et al.,

Intervenor-defendants.

-and-

DOUGLAS ALMSKOG, et al.,

Intervenor-Defendants

-and-

ROBERT HYMAN, et al.,

Intervenor-Defendants

THE GUARDIANS ASSOCIATION, et al.,

-against-

THE NEW YORK CITY POLICE DEPARTMENT, et al,

Defendants.

-and-

FRANCIS SHIELDS, et al.,

Intervenor-defendants.

-and-

DOUGLAS ALMSKOG, et al.,

Intervenor-Defendants

-and-

ROBERT HYMAN, et al.,

Intervenor-Defendants

Hereinafter: [Caption Omitted]

Hispanic Society Interim Order
U.S. Dist. Court, So. Dist. N.Y.
[Joint Caption Omitted] 84 Civ 6628 (RLC)

& 84 Civ 8405 (RLC)

WHEREAS the plaintiffs .and defendants in the above captioned cases have agreed to settle these matters in a manner consistent with the best interests of all the parties and the people of the City of New York: and,

WHEREAS, there is a severe shortage of sergeants in the New York City Police Department and consequently a threat tp the safety and welfare of the citizens of the City of New York;

IT IS HEREBY STIPULATED AND AGREED by and among the undersigned that the deefendnts New York City Police Department and Department of Personnel of the Cityof New York may promote to the rank of sergents as many police officers as are in their judgment needed from the

Eligible List resulting from Examination No. 2548 and from other black and Hispanic police officers who are not on the eligible list; provided that the number of Hispanic police officers promoted shall equal 8.7% of all sergeants who are promoted pursuant to this agreement and were provisionally romoted during the period from October 1, 1984 through and includin December 28, 1984; and, provided that the number of black police officers promoted shall equal 12.3% of all sergeants who are promoted pursuant to this agreement and were provisionally promoted during the period from October 1, 1984 through and including December 28, 1984. In order to make promotions of black and Hispanic police officers in accordance with the above percentages after promoting black and Hispanic officers who are currently

on Eligible List No. 2548, said defendants shall add sufficient numbers of black and Hispanic police officers to the eligible list basedupon their 'raw scores on the technical knowledge component of Examinatin No. 2548 adjusted within each rawscore by veterans credist, seniority and merit points.

Dated: New York, N.Y. November 27, 1985

[Endorsements omitted]

So Ordered:

s/ROBERT L. CARTER, USDJ.

Hispanic Society et al Order, Feb. 7, 1986.
U.S. Dist. Court, So. Dist. N.Y.
[Joint Caption omitted]

WHEREAS, plaintiffs in the above captioned matters, along with the defendants, the City of New York, the New York City Police Department and the Aew york City Department of Personnel ("the Ne York City defendants") and intervenor defendants, Francis Shields, Michael Ward, Helene Rinaldi, Ferdinand Guerra, Peter mahon and the Sergeants Benevolent Association and intervenor defendants Douglas Almskog, anthony Richee, Donald Smith, Susan Fox, Morray Vine, Robert DeMar and the Exam No. 2548 Sergeant's Elibibles Associatin, have submitted to the Court on this date a Stipulation of Settlement, whereby they seek to resolve these matters amicably and without the need for further litigation.

NOW THEREFORE IT IS HEREBY ORDERED that a hearing shall be held on the question of whether this Court should find that the settlement proposed by the above named parties is reasonale, fair, adequate and in the best interest of the parties and the respective classes represented by certain of the parties, and should approve the proposed settlememt. Said hearing shall commence at 9:30 a.m. on April 17, 1986. Notice shall be sent by the New York City Defendants in the form atached as Appendix A to the Stipulation of Settlement not later than February 27, 1986. Any individual who wishes to express an objection to the settlement and to be heard with respect to such objection at the hearing shall submit the objection i writing to the Clerk of the Court, Room 10, United States Courthouse,

Southern District, Foley Square, New York, New York, and serve copies on counsel for the parties to the settlement agreement, not laer than April 3, 1986. Objections received by the Court after said date shall not be considered in connection with the Court's deliberations regarding whether the settlement should be approved, and the peson submitting the objection shall have no right to appear and be heard with respect to such objection at the hearing.

It is so ordered.

Dated: February 7, 1986

New York New York. s/ Robert L. Carter, USDJ.

Hispanic Society et al Stipulation of Settlement January 23, 1986
U.S. Dist. Court, So. Dist. N.Y.
[Joint Caption Omitted] 84 Civ 6628 (RLC) & 84 Civ 8405 (RLC)

WHEREAS, plaintiffs in The Hispanic Society, et al., v The New york City Police Department, et al., 84 Civ. 6628 (hereinafter "Hispanic Society), filed a complaint in this Court on Spetember 14, 1984; plaintiffs in The Guardians Association et al. v The New york city Police Department, et al., 84 Civ 8504 (hereinafter "Guardians Association") filed a complaint in this Court on Novemmber 26, 1984; and each of the aforementioned complaints allege that defendantsthe New York City Police Depatment, et al., (hreinafter "the New york City defendants"), through their intended use of the results of Civil Service Examination No. 2548 for the

selection of individuals for promotion to the rank of Sergeant, had violated, or wouldbviolate, Title VII of the Civil Rights Act of 1964, as amnded, 42 USC Secs. 200e, et seq. (hrreinafter "Title VII"); Article 5, Section 6 of the New York State Constitution; ans section 50 of the New York Civil Service Law; and

WHEREAS, the Complaint in Guardians Association alleged violation of the New York State Human Rights Law (Article 15 of the Executive Law); and

WHEREAS, Plaintiffs allege that the asserted violations of the aforementined provisions were, or would be, the consequence of allegedly unlawful discrimination produced by the New York City defendants' intended use of the results of Civil Service Examination No. 2548 for the selection of individuals for promotion to the rank of Sergeant, in the

New York City Policr Department; and

WHEREAS, Francis Shields, Michael Ward, Helen Rinaldi, Ferdinand Guerra, Peter Mahon and the Sergeants Benevolent Association (hereinafter referred to collectively as "the Sergeants Benevolent Association") were granted status as intervenor defendants in Civil Action No. 84 Civ. 6628 and in Civil Action No. 84 Civ. 8504 by order of this Court dated May 17, 1985; and

Whereas, Douglas Almskog, Anthony Riche, Donald Smith, Susan Fox, Morrey Vine, and Robert Demar, individually and or hehalf of Sergeant's Eligibles Association (hereinafter collectively referred to as "the Sergeant's Eligibles Association") were granted status as intervenor defendants in Civil Action No. 84 Civ. 6628 and in Civil Action No. 84 Civ. 8504 by order of this Court dated

November 22, 1085; and

WHEREAS plaintiffs in Hispanic Society have been certified as representatives of a class of all Hispanic candidates who took Examination No. 248 pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure by Order of the District Court dated June 14, 1985; and

WHEREAS, plaintiffs in Guardians Association have sought to represent a plaintiffs' class of black candidates who took Examination No. 2548; intervenor defendant Sergeants Benevolent Associatin has sought to represent a defendant class comprised of police officer members of the Sergeants Benevolent Association who took Examination No. 2548 were named to Eligible List No. 2548, and were provisionally promoted to the rank of Sergeant in the period from October 1,

1984 through and including December 28, 1984; and intervenor defendant Sergeant's Eligibles assopciation has sought to represent a defendant class comprised of police officers who took Examination No. 2548, were named to Eligible List No. 2548, but who were not provisionally promoted to the rank of Sergeant by or before December 28, 1984; and

WHEREAS, these actions raise common issues of law and fact, making consolidation appropriate pursuant to Rule 42(a) of the Federal Rules of Civil Procedure for purposes of this agreement and of any proceedings in connection with this agreement; and

WHEREAS, the subject matter of each of these actions is, inter alia, Civil Service Eamination No. 2548, which was administered in June of 1983 and April of 1984 for the purpose of making promotions

to the rank of Sergeant in the New York City Police Department, and which resulted in the promulgation of Eligible List No. 2548 for such promotions pursuant to New York Civil Service Law; and

WHEREAS, there is no evidence in either of the above captioned actions of unlawful intentional discrimination of any kind; and

WHEREAS, Eligible List No. 2548 is comprised of 1041 police officers, of whom 44 are Hispanic and 24 are black; and Hispanic candidates comprised 8.7%, blacks comprised 12.3%, and whites comprised 79.0% of the 11,899 police officers who took Examination No. 2548; and

WHEREAS, the cutoff point for Eligible List No. 2548 was set by the New York City Defendants for the purpose of

producing a list comprised of approximately 1000 candidates with the higheest scores oon the Examination; and the cutoff point was not set based on a determination that those who scored below that point were nt qualified to be Sergeants; and

WHEREAS, the New York City Defendants developed an examination for entry level police hirings (Examination No. 8155) in 1978, utilizing a "content validation" strategy, and that examination was challenged as being in violation of Title VII in Guardians Association, et al., v Civil Service Commission, et al., S.D.N.Y., 79 Civ. 5314 (RLC) ("Guardians IV"); and

WHEREAS, judgment as entered by the District Court in favor of plaintiffs in Guardians IV and affirmed, in part, by the United States Court of Appeals for

the Second Circuit, 630 F.2d 79 (2d Cir. 1980), which held that the New York City defendants:

> in the interim period prior to development of a new, valid selection procedure, [should be permitted] to use the results of Exam No. 8155 in a way that avoids any disparate racial impact. This means selecting candidates from the eligibility list subject to the minority proportion of either the applicant pool or the relevant work force...

630 F.2d at 113; and

WHEREAS, the United States Supreme Court denied the New York City defendants' petition for a writ of certiorari seeking review of the decision of the Second Circuit in Guardians IV; and

WHEREAS, the New York City defendants neither admit nor concede that Examination No. 2549 is racially discriminatory, or that promotions based on the results of Examination No. 2548 would be racially discriminatory; and

WHEREAS, unter Title VII law there is a presumption that Hispanic and black test takers have been adversely affected by Examination No. 2548; and

WHEREAS, the New York City defendants after reviewing all of the large volume of material and testimony that has been produced in Hispanic Society and Guardians Association, have concluded that there would be a substantial risk that they would be unable to carry the extraordinary burden of proof that is imposed on employers in cases in which a disparate impact analysis is used, and that the exceptionally high technical standards required by the cases of the Second Circuit to be met by employers seeking to prevail in cases in which the disparate impact model is appropriate would likely make it impossible for defendants to

demonstrate the requisite degree of perfection in Examination No. 2548 to have its technical validity sustained; and

WHEREAS, plaintiffs in Hispanic Society and Guardians Association have reviewed the evidence on the validity of Examination No. 2548 and believe there is a substantial likelihood of success at trial; nevertheless, mindful of the vicissitudes of litigation, plaintiffs have agreed to settle these matters in a manner consistent with the best interest of all concerned; and

WHEREAS, all parties agree that, irrespective of any potential difficulties that might be faced by the New York City defendants in attempting to satisfy technical burden of proof requirements, Examination No. 2548 has some syschometric utility, and the

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results of Examination No. 2548, as hereinafter modified and consistent with the Second Circuit's decision in Guardians IV, can and should be used to make promotions to the rank of Sergeant so long as care is taken to minimize or eliminate any potentially discriminatory effects; and

WHEREAS, all parties agree that the New York City Police Department is currently experiencing a severe and critical shortage of Sergeants with approximately 1400 vacancies in the rank, that this shortage of supervisors creates conditions that constitute a threat to the safety and welfare of the citizens of the City fo New York, and that the public interest is best served by an expeditious resolution of these disputes that would permit the pomotion of at least 1,000 officers to the rank of Sergeant as soon

as possible; and

WHEREAS, in light of the above and absent an agreement among the parties hereto providing for promotions from Eligible List No. 2548 in such a manner as to accommodate reasonably the interests of the parties and the community, it probably would be necessary for the New York City defendants to demote all police officers provisionally promoted to the rank of Sergeant from Eligible List No. 2548, further making it necessary for all officers who have earned a place on Eligible List No. 2548 to submit to the next qualifying examination in order to be considered for permanent promotion to the rrank of Sergeant; and it is the belief of the parties hereto that such an eventuality would produce a substantial deleterious effect on the morale and good order of

the New York City Police Department; and

WHEREAS, the New YorkCity defendants and the intervenor defendants herœby agree that this Court has personal jurisdiction over the respective parties to this agreement; and

WHEREAS, the parties to this agreement agree that this Court has subject matter jurisdiction over the issues raised in the Complaints and Answers filed in these actions;

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED, by and between the parties to the above captioned actions, as represented bytheir attorneys undersigned below, and suject to the approval of the Court as follows:

I. DEFINITIONS.

As used in this agreement:

A. Plaitiffs. "Plaintiffs" shall mean and refer to the Hispanic Society

plaintiffs and the Guardians Association plaintiffs.

B. Hispanic Society plaintiffs. The "Hisipanic Society plaintiffs" shall mean and refer to all of the plaintiffs in Hispanic Society et al. v The New York City Police Department, et al., 84 Civ 6628 (RLC).

C. Guardians Association plaintiffs. The "Guardians Association plaintiffs" shall mean and refer to all of the plaintiffs in Guardians Association, et al. v The New York City Police Department, et al., 84Civ. 8504 (RLC).

D. New York City defendants. The "New York City defendants" shall mean and refer to the City of New York, the New York City Police Department, the New York City Department of Personnel, and all officers, employees or agents, whether

elected or appointed, of the City of New York, but not including the Hispanic Society plaintiffs, the Guardians Association plaintiffs, the intervenor defendants or any individuals or groups represented by the Hispanic Society plaintiffs the Guardians Association plaintiffs, or intervenor defendants.

E. Intervenor-defendant. The "Interervenor defendants" shall mean and refer to the Sergeants Benevolent Association and the Sergeant's Eligibles Association.

F. Party or Parties "Party" or "Parties" shall mean and refer to Hispanic Society plaintiffs, the Guardians Association plaintiffs, the New York City defendants and the intervenor defendants.

G. Title VII. "Title VII" shall mean and refer to Title VII of the Civil

Rights Act of 1964, as amended, 42 USC Sec. 2000e et seq.

H. Black or Blacks. "Black" or "Blacks" shall mean an refer to any person or persons, not of Hispanic origin having origins in any of the black racial groups of Africa.

I. Hispanic or Hispanics. "Hispanic" or "Hispanics" shall mean and refer to any person or persons, regardless of race, having origins in Mexico, Puerto Rico, Cuba, Central Or South America, Sapin or other country where the dominant language is Spanish.

J. Eligible List No 2548. "Eligible List No. 2548 " shall mean and refer to the list of police officers created as a result of the examination for Sergeant given by the New York City defendantsin June of 1983 and April of 1984.

II PROCEDURAL MATTERS

A. the above captioned civil actions may be and hereby are consolidated for purposes of this settlement and any proceedings incident thereto pursuant to Federal Rule of Civil Procedure 42.

B. Guardians Association may be and hereby is ertified as a plaintiffs' class action and the nemed plaintiffs therein and their counsel are adquate representatives of the class. The class consists of allblack police officers who took Examination No. 2548.

C. Intevenor-defendants Sergeants Benevolent Association may be and hereby are certified as representatives of an intervenor class in both of the above captioned actions, and the named intervenor defendants and their counsel are adequate representatives of the

class. The Sergeants Benevolent Association's intervenor class consists of all police officers whose names appear on Eligible List No. 2548 and who were provisionally appointed to the rank of Sergeant at any time after October 1, 1084 through and including December 28, 1984, pending determination of the above captioned actions.

D. Intervenor defendants Sergeant's Eligibles ssociation may be and hereby are certified as representatives of an inteervenor class in both of the above captioned actions, and the named intervenor defendants and their counsel are adequat representatives of the class. The Sergeant's Eligibles Association's intervenor class consists of all police officers whose names appear on Eligible List No. 2548 and who were not provisionally promoted to the rank of

Sergeant by or before December 28, 1984.

III. PROMOTIONS FROM EIIBIBLE LIST NO 2548.

A. Promotions from Eligible List No. 2548; The parties to this agreement contemplate that at least 1,000 perrmanent promotions to the rank of Sergeant will be made from Eligible List No. 2548. Subject to he provisions of Section 56 of the New York Civil Service Law, Eligible List No. 2548, as modified pursuant to the provisions of this agreement, shall be utilized for such promotions. Such promotions shall be made not later than 10 days following the entry of final approval of this agreement by the District Court. All promotions made pursuant to this agreement shall also be subject to the provisions of Sections 50 and 61 of the Civil Service Law.

B. Hispanics: The New York City defendants shall promote a sufficient number of Hispanic police officers to the rank of Sergeant in each successive class, or group, promoted from Eligible List No. 2548 such that the ratio of the number of Hispanic police officers promoted from the Eligible List to the total number of all police officers promoted to the rank of Sergeant from that List (including promotions that have been made prior to the approval of this agreement by the District Court) corresponds to the percentage of Hispanic police officers who took Examination No. 2548 . The parties agree that this percentage is 8.7%. The New York City defendants shall meet this goal by first promoting Hispanics on the Eligible List in rank order in relation to each other. Once these police officers have been

promoted, additional Hispanics shall be added to the Eligible List based on their raw scores on the technical knowledge component of Examination No. 2548. These additional Hispanics shall be ranked vis-a-vis each other based on their raw scores on the Technical knowledge test -- those with the highest score will be promoted first, those with the next highest score will be promoted next, etc. Those at each raw score point shall be ranked vis-a-vis each other by adjustments for veteran credits, seniority and merit computed in the same way as was done in preparing the original Eligible List No. 2548. Such adjusted scores shall be used solely for ranking Hispanic candidates with identical scores, and in no case shall any Hispanic candidate be given preference for promotion based on his or her adjusted

score over any other Hispanic candidate with a higher raw score on the technical knowledge test. The process of successively lowering the technical knowledge test score levels shall be repeated until the appropriate number of qualified Hispanic candidates shall have been obtained.

C. Blacks: The New York City defendants shall promote a sufficient number of black police officers to the rank of Sergeant in each successive class, or group, promoted from Eligible List No. 2548 such that the ratio of the number of black police officers promoted from the Eligible List to the total number of all police officers promoted to the rank of Sergeant from that List (including promotions that have been made prior to the approval of this agreement by the District Court) corresponds to the

percentage of black police officers who took Examination No. 2548 . The parties agree that this percentage is 12.3%. The New York City defendants shall meet this goal by first promoting blacks on the Eligible List in rank order in relation to each other. Once these police officers have been promoted, additional blacks shall be added to the Eligible List based on their raw scores on the technical knowledge component of Examination No. 2548. These additional Blacks shall be ranked vis-a-vis each other based on their raw scores on the Technical knowledge test -- those with the highest score will be promoted first, those with the next highest score will be promoted next, etc. Those at each raw score point shall be ranked vis-a-vis each other by adjustments for veteran credits, seniority and merit computed in

the same way as was done in preparing the original Eligible List No. 2548. Such adjusted scores shall be used solely for ranking black candidates with identical scores, and in no case shall any black candidate be given preference for promotion based on his or her adjusted score over any other black candidate with a higher raw score on the technical knowledge test. The process of successively lowering the technical knowledge test score levels shall be repeated until the appropriate number of qualified black candidates shall have been obtained.

D. Notice of Promotions: At least three working days prior to any date on which promotions to the rank of Sergeant are to be made, the New York City Police Department, through the office of the Corporation Counsel, shall provide

plaintiffs' counsel with a list of the police officers to be promoted setting forth their race and ethnicity.

IV. MISCELLANEOUS MATTERS

A. Back pay: The New york City defendants shall pay back pay to each member of the plaintiff classes who would have been promoted if this agreement had been in effect at the time that provisional promotions were mde in the period after October 1, 1984 through and including December 28, 1984. The amont of each such individual's back pay entitlement shall be computed as one half of the difference between the amount actually earned and paid to such individual (including overtime premium pay or night differential, if any), and the amount he or she would have earned and been paid for the same hous and the same shifts had his or her compensation

in the applicable period been computed using the base rate compensation applicable to Sergenats. The applicable period for back pay entitlement under this provision shall be the period from the date on which each police officer who is entitled to back pay wold have been provisionally promoted to h rank of Sergeant if this agreement had been effect at the time that such promotions werre made from after October 1, 1984 through and including December 28, 1984, to the dat on which such officer was first promoted, whether provisionally or permanently to the rank of Sergeant. nothing in this agreement shall be construed to entitle an individual to back pay in any amount if he or she was in fact provisionally promoted to the rank of Sergeant in the period from after October 1, 1984 through and including

December 28, 1984, and such promotion occurrred on or beforre the date on which it would have occurred pursuant to the terms of this agreement had the agreement been in effect at the time.

B. Retroactive Seniority: All police officers who have been provisionallypromoted to the Rank of Sergeant on the basis of the results of Examination No. 2548 during the period from after October 1, 1984 through and including December 28, 1984, upon having their provisinal promotions made permanent, shall be awarded seniority in the rank of Sergeant retroactive to the date of their provisional promotions for all purposes, including completion of their probationary periods. Those Hispanic and black police officers promoted pursuant to Section III of this agreement who would have been promoted at

the time that the aforementioned provisional promotions were made from Eligible List No. 2548 if this agreement had been in effect at that time upon being permanently promoted, shall also be awarded seniority in the rank of Sergeant retroactive to the date of such provisional promotions for all purposes except for that of completion of their probationary priods. All other officers promoted from Eligible List No. 2548 and pursuant to the terms of this agreement shall begin to accrue seniority in the rank of Sergeant from the date of their permanent promotions.

C. Attorneys' Fees: The New York City defendants agree thatt plaintiffs are entitled to reasonable attorneys' fees and costs including expert fees in accordance with 42 USC Sec. 200e-5k. Within 30 days of the entry of an order

of final approval of this settlement agreement, the parties shall attempt to agree on the appropriate amount of such fees and costs. if no areement is reached within that time, the matter shall be submitted to the court for resolution.

D. Defense of Agreement; Removal= Intervention: the parties agree to defendd this agreemen against any challenge to it. In addition the New york City defendants shall seek removal to federal court, to the extent permitted by law, of any lawsuiitt which is filed in any court of the State of New York challenging this agreement or its implementation. as soon as practicable, but in any event no later than 10 days after the New Yok City defendants are notified of such a lawsuit, they shall notify theparties to the above captioned

cases of the pendency of the suit. No party shall opose intervention of any other party to this agreement in such litigation. Nothing herein shall be construed to compel any party to this agreement to intervene or otherwise to become a party litigant to any action challenging this agreement.

E. Enforcement of Agreement: The terms of this agreement shall be enforceable upon a motion filed by any party. For the purposes of such motions, the parties hereto recognize and acquiesce in the jurisdiction of the united States District Court for the Southern District of New York to issue any affirmative orders it may deem necessary to compel compliance with the terms of this agreement. The parties to this agreement further agree to waive any and all objections to the entry of such

affirmative orders on the grounds that the moving party has not or will not suffer irreparable injury as a result of the breach ofthis agreement, or that the moving party has or may have an adequate remedy at law.

F. No Admission of Liability: Nothing in this agreement shall be deemed or construed as an admission of liability. This agreement shall not be deemed or construed as a precedent or be admissable in any court of law as evidence in any claim or lawsuit of any kind except in Hispanic Society and Guardians Association or in any lawsuit challenging this agreement.

G. Rights Under Rule 60 Preserved: Nothing in this agreement shall affect the rights of the parties to seek to modify or vacate any order or final judgment in these actions pursuant to

Rule 60 of the Federal Rules of Civil Procedure.

H. Final Resolution: Upon final approval by the Court of this agreement, all of the complaints in 84 Civ. 6628 and 84 Civ. 8504 shall be dismissed with prejudice.

I. Recordkeeping: All individuals who apply for promotion under the new selection procedures to be administered on a date in 1986 to be announced by the New York City defendants and who submit to examination for that purpose, will be required to identify their race and ethnicity on the application for. However, no person who fails to provide such information shall be disqualified for that reason. Counsel for the New York City defendants will notify counsel for all parties of the race and ethnicity of all of the individuals who were

evaluated by, and who passed, the new selection procedure as soon as these data are compiled and available.

V. NOTICE TO THE CLASS

A. By no latter than February 27, 1986, the Notice attached as Appendix A shall be sent by the New York City defendants, at theier sole cost and expense, to all members of both the plaintiff and intervenor classes and posted in all precincts of the New York City Police Department.

B. A hearing will be held by the court at 9:30 a.m. in Room 518 on April 17, 1986, regarding the final approval and entry of this agreement.

C. If for any reason this agreement shuold not be finally approved and entered by the Court without modification, all terms set forth herein shall be null, void and of no legal

effect; provided, however, that a modification of the provisions set forth in Section II, Paragraph C and D hereof, if any such modification should be ddeemed by the Court to be in the interest of justice or compelled by applicable procedural rules, shall not, without more, have the effect of rendering any other provisions of this agreemen null, void or of no legal effect.

Dated: New York, N.Y. January 23, 1986 [Endorsements omitted].

Municipal Defendant letter request for case assignment to Judge Carter from Judge Sweet. [NYC Corporation Counsel Letterhead Omitted & Address omitted.]

January 14, 1986.

Re: Hispanic Society et alv New York City Police Dept. et al, 84 Civ 6628(RLC)

Evelyn Marino et al. v Ortiz et al, 85 Civ 10068 (RWS)

Dear Judge Carter: This office reprsents defendants in both of the above referenced actions arising out of the administration of a promotional examination for police sergeant in the New York City Police Department in June 1983. This letter is written pursuant to Rule 15 of this Court's Rules for the Division of Business, to request that the above referenced action be transferred to you as a related action.

As you are aware, the Hispanic

Society which sought to invalidate the examination and the resulting eligibility list as violative of title VII of the Civil Rights Act of 1964, 42 USC 200-e2(a)-(d), has resulted in a proposed class wide settlement wherein minority candidates who did not pass the examination would be promoted without regardto their failure of the examination or their position on the ranked list of candidates who failed the examination. Judity Levitt, Chief, General Litigation Division, has advised me that the settlemtn shpuld be filed with the court shortly and a hearing for the purposes of consideration of objections to the proposed settlement will be scheduled thereafter. Copies of the complaints in The Hispanic Society and the consolidated action entitled The Guardians Assciation, et al v The New

York City Police Department, 84 Civ. 8504 (RLC) are attached to the copy of this letter sent to Judge Robert W. Sweet.

Marino et al v Ortiz et al. served on defendants on December 30, 1985 and asigned to Judge Sweet, is merely an objection to the proposed settlement in Hispanic Society. A copy of the compláint in Marino et al v Ortiz et al is attached hereto. The Marino plaintiffs are candidates for the promotional examination who have failed the examination, some of whom have examination scoores equal to or higher than those mi nority candidates who were nevertheless promoted to sergeant pursuant to the Hispanic Society litigation. marino is predicated on the U.S. Constitutiin Amendments 5 and 14, and 42 USC Sec. 1983 and collaterally attacks the proposed Hispanic Society

settlement. It seeks and injunction requiring defendant to promote the Marino plaintiffs as well and would thereafter undermine the purpose of the Hispanic Society settlement.

Marino not only arises from the same promotional examination as does Hispanic Society, but present the precise issues of law and fact that will be evaluated by the court in considering objections to the proposed settlement and in approving the consent decree. The continued assignment of Marino to Judge Sweet will also entail substantial duplication of labor in the discovery proces and the trial, and if successful, would result in inconsistent order from two judges of this Court.

For these reasons, defendants Ortiz et al. respectfully request that Marino et al v Ortiz et al be reassigned from

Judge Sweet to Your Honor pursuant to Rule 15 of the Local Rules for he Division of Business, as a related action. Thank you for your assistance in this matter. [Endorsement omitted]

Affidavit of J. Toal in Support USDC SDNY
U.S. Dist. Court, So. Dist. N.Y.
[Caption & Jurat omitted]

JOSEPH V. TOAL, being duly sworn deposes and states as follows:

1. My name is Joseph V. Toal. I am Vice President of the Sergeants Benevolent Association ("SBA"), which was granted permission to intervene as a defendant in the above styled case on May 17, 1985.

2. The SBA is the exclusive bargaining representative for Sergeants employed by the City of New York in the New York City Police Department ("NYCPD").

3. I have served on the New York City Police Force continuously since November 1959, and I have been a Sergeant on the force since September 1971. During my more than twenty six years of service, I have served as police officer

on patrol in various precincts throughout the City. I also served for nine years in the Narcotics Division and in various positions in the Detective Bureau of the Police Department for a total of more than nine years. My positions in the Narcotics Division and Detective Bureau required me to perform police work throughout the City Thus, I am familiar with the operation of the Police Department throghout the City and, specificially, familiar with the day to day operations at the precinct level.

4. i have been associated with the SBA since 1976, and I became a member of the Board of Directors in approximately 19798. I was elected Treasurer in 1980 and have served as Vice President since 1982. In my capacity as an officer and a member of the SBA I have gained personal knowledge of the administration

of Examination No. 2548 and of the events that have occurred since the filing of the two above styled cases.

5. Examination No. 2548,with was a civil service examination for promotion to the rank of Sergeant in the NYCPD, was administered in June 1983 and April 1984. Approximately 11,899 candidattes took the examination. Of the candidates taking the examination, approximately 79.0% were white, 12.3% were black and 8.7% wre Hispanic. Based on the results of the examination and other relevant factors, the City established an Eligible List of approximately 1,041 candidates who were given rank ordered positions for promotion to sergeant. The Eligible List was composed of approximately 973 whites (93.47%), 24 blacks (2.30%, and 44 Hispanics (4.23%).

6. In September and November 1984,

respectively, the Hispanic Society and the Gardians Association filed suits alleging that Examination No. 2548 was racially discriminatory and aninjunction was entered prohibiting the promotion ofpersons to Sergeant from the Eligible List. Shortly after the filing of the suits, one or more interim orders were entered permitting the provisional promotion of a certain number of candidates from the Eligible List. On or before December 28, 1984, the City made 534 provisional promotions from the Sergeants' Eligible List, of which 509 promotions were granted to white candidates, 7 were granted to black candidates and 18 were granted to hispanic candidates.

7. After several months of operation under provisional status, the provisional Sergeants became concerned

abut the uncertainty of their situation andthe problems that their status created for them on the job and the effect of those problems had on the operation of the NYCPD. About March of 1985, the provisional Sergeants asked the SBA to assist them in resolving their concerns about their stats and the problems that had arisen as a consequence of that status. At this time, rumors were circulating that the City planned to administer another examnatin and extablish a new Eligible List. In addition, we were told that in such an event the City's position would be that establishment of a new Eligible List could automatially result in the demotion in rank of the provisional Sergeants.

8. Because the SBA shared the concern expressed by the provisional Sergeants, the Board of Directors of the

SBA decided to seek intervention in this case principally to protect the interests of the candidates who had been provisionally promoted to Sergeant on or before December 28, 1984. Interventin was requsted and this Court granted intervention on May 17, 1985.

9. The provisional Sergeants also formed a group to represent their interests and worked with the SBA to select counsel to represent the provisionals' interest in this litigation. Sgt. Peter Manon, President of the SBA, directed me to establish a liason with the provisional Sergeants' group so that the SBA legal counsel could make informed decisions about the appropriate action to take. I assisted in the formation of a Steering Committee of the provisional Sergeants and have worked continually with that group since

its formation.

10. Because ofthe specialized nature of the legal and technical issued raised, the SBA decided that, in aadition to its able local counsel, it should retain outside counsel with extensive experience in Title VII litigation. Accordingly the SBA retained Mr. Adam Ira Klein, its local counsel for labor issues, and also retained for association with Mr. Klein in the case Mr. Richard K. Walker, an attorney for Washington, D.C. who has had extensive experience in litigation of equal employment opportunity class actions and who also had particularly relevant experience in litigation of equal employment opportunity class actions and who also had particularly relevant experience in representing one of the parties involved in the litigation concerning the 10978

Sergeants' examinatin (Examination No. 8539).

11. In or about September, 1985 the parties began serious settlement discussions. At that time, we were informed that the City had determned that it could not carry the extraordinarily heavy burden of proof that it would have to carrry to have the technical validity of Examination No. 2548 sustained. Additionally, at this time, there were a large number of vacancies in the Sergeants' ranks of the NYCPD. This situatin created a severe problem for all Sergeants since the manning provisions for precincts requir two supervisors on each tour: one on the desk in the precinct and one on patrol. If the sergeant ranks are not on or near quota, a police officer must be put on the desk. In many cases such an officer is not

fully equipped to do the job and has no real authority to supervise other police officers. Nevertheless, the Sergeant on duty is held responsible for all that happens in his sector of responsibility even though he isnot in the st.ation house. This circumstance was a demoralizing situation for all Sergeants but was particularly demoralizing for provisional Sergeants, who were thought to be more vulnerable to departmental discipline. The Department's position, as we understand it, is that provisional Sergeants cam be summarily demoted withut the hearing or other procedural protections provided to permanent Sergeeants. Adding to the insecurity created by this vulnerability to discipline, rumors were circulating at this time that the City intended to schedule a new qualifying examination for

promotion to Sergeant in Jauary of 1986. It was the Department's position that when a new Eligible List was established from the new examination, the provisional Sergeants, who did not pass the new test and eceive a position on the new Eligible List, would be automitially demoted in the ranks.

12. The uncertainty of their status created other problems for the provisional Sergeants and also underrmined the efficiency of the operation of the NYCPD. The widely held belief that provisional Sergeants were subject to demotion created significant suprvisory and discipline problems. Some police officers would not cooperate as fully nor respond as readily to discipline by provisional Sergeants. Also, provisional Sergeants were less likely to be selected for specialized

details, which might enhance the possiblity forfuturre promotions, because of a concern as to the uncertainty of their status. The announcement 'of tentative dates for a Lieutenants' qualifying examinatin added to that frustration since it was and is unclear wwhether the provisional sergeants would e permitted to take the exmination.

13. The circumstances existing at the time for the settlement discussins presented three alternatives to the Steering Committee. First, we could attempt to maintain the status quo and proceed with litigation of the case. Second, we could attempt to reach a settlement that dealt as fairly and equitably as possible with all the interests involved. Third, we could accede to the administration of a new examination which, according to the City,

could result in all provisional Sergeants being demoted automatically as described above.

14. The first option was an unacceptable alternative given the current morale and discipline problem existing in the police force and given the City's position concerning its inability to defend the technical validity of Examination No. 2548. The third option was an unacceptable alternative because it would simply result in a much more severe morale and discipline problem in the police force than currently existed and it would be extremely unfair to the 534 provisional Sergeants who had served in the rank successfully under extremely difficult circumstances for a year or more.

15. From the settlement discussions, it was clear that some form of race conscious remdy would have to be part of any settlement in order to satisfy the interests of the plaintiffs

in the two above styled cases. The SBA has long beenopposed to the use of quotas in the hiring and promotion of police officers and has stated that position on numerous occasions. Here, however, the other alternaives provided completely unacceptable results. Moreover, given the difficulties arising in the administration of Examination No. 2548, the seriousness of thequestins that had been raised concerning the technical validity of the examnation, and the confidence of all concerned that the candidates to be promoted under the settlement were all qualified to be Sergeants, the SBA and the Steering Committee was convinced that the settlement before this Court provided a fair and equitable means for accommodating the legitimate interests of all of the parties involved.

16. Under the terms of the settlement all of the candidates on the Eligible list have been promoted to

provisional Sergeant. In addition to the original 534 provisional promotions, since Decemer 28, 1984, approximately 573 other candidates have been provisionally promoted to Sergeant. Of that group, approximately 366 white candidates were granted provisional promotion, 126 black candidates were granted provisional promotion and 81 hispanic candidates were granted provisional promotion. According to the most current police force record, the total number of Sergeant needed in the department is 2,825. There are currently 2,431 Sergeants serving in the rank, of which approximately 1,328 are permanant Sergeants and approximately 1,103 are provisional Sergeants. There are approximately 394 Sergeant vacancies at this time.

17. I have reviewed a list of the names of persons who filed individual objections to the proposed settlement and the list of persons whom messrs. Schneider and Podolsky purport to

represent. To the best of my knowledge, none of those persons are among the 534 provisional Sergeants who were promoted on or before December 28, 1984.

18. I have reviewed the collective bargaining agreement between the Sergeants Benevolent Association and the City of New York, and it is my opinion that there is nothing in the settlement agreement before this Court that is contrary to or inconsistent with that collective bargaining agreement.

19. The Board of Directors of the SBA and the Steering Committee have concluded tha final approval ofthis settlement is in the best nterest of tythe provisional Sergeants. This affidavit is submitted in suport of approval of the settlement and the facts stated herein are true and accurate to the best of my information, knowledge and belief.

verified April 15, 1986 [Endorsement omitted].

Affidavit of Goodstein in Support
U.S. Dist. Court, So. Dist. N.Y.
USDC SDNY [Caption Omitted]

ROBERT DAVID GOODSTEIN being an attorney admitted to practice in the State of New York, hereby affirms under penalty of perjury:

1. I am a partner in the law firm of GOODSTEIN & WEST, and I am the partner in charge of this litigation. In this capacity, I represent the black plaintiffs in Civil Action No. 84 Civ. 8504,. As part of the propised settlement before the Court, the plaintiffs in this action will be certified as propeer class representatives for the class of all black candidates for sergeant who took Examination 2548. I make this affidavit in support of said certification. It is based upon my own knowledge and on documents contained within my files.

2. Pursuant to Rule 23 of the Federal Rules of Civil Procedure to be certified as class representatives, plaintiffs must establish: a) That the class is so numerous that joinder of all members is impracticable; b) There are common questions of law or fact; c) The claims of the representative parties are typical of the claims of the class; d) the representative parties will fairly and adequately protect the class interests.

3. The class has been adequately described as all black candidates who took sergeants' promotional Examination #2548. The description of the class is similar to the description of individuals certified pursuant to Rule 23(a)and (b)(2). On June 14, 1985 as representatives of a class of all Hispanic candidattes for seryeants who

took Examination 2548. Although mere numbers alone is not determinative of whether a class should be certified, 1420 os such a large number that joinder is impracticable. Further, the size of the purported class of Hispanic candidaates who took Examination #25448 was 1001. Class cetification was granted to this group on June 14, 1985.

5. There are common questions of law and fact. The potential classis composed of black New York City Police Officerrs who took Examination "2548. All plaintiffs must establish identical facts. Further, the sole potential defense available to defendants is that the examination is "job related". This defense would either be applicable to the entire class or to no one.

6. Plaintiffs include the Guardians Association of the Police Department of

the City of New York. This fraternal organization of black police officers has for the past 25 years, been in the forefront of the struggle to insure equal employment opportunity in the New York City Police Department. At least twice earlier the organization has successfully been certified as fairly and adequately representing a class of black police officers. Further, the very settlement at bar, and the abosolute lack of objections filed on behalf of black candidates establishes that the class representatives adequately represented and protected the interest of the class. Finally, the named plaintiffs are not receiving extraordinary benefits from the settlement.

8. The attorneys for the plaintiffs are competent to represent the class. The terms of the settlement itself, with

the back pay provision, as well as the lack of objections by black candidates establish the competence of counsel. On information and belief this is the first settlement of Guardians' litigation with New York City to provide for back pay. By the requirement that the attorney for the class representative be "experienced", the Federal Rules require that counsel be both knowledgeable in the specific type of litigation involved. Robert David Goodstein, the attorney with prime responsibility for this case, has been representing employees in matters of employment discrimination for almost ten (10) years. Mr. Goodstein was initially associated with the New York Civil Liberties Union where his practice was almost exclusively employment discrimination. From March 1978 through March, 1981, Mr. Goodstein was employed

by the New York State Division of Human Rights as Senior Attorney / Assistant Counsel. After representing individual complainants on charges of discrimination during his first 18 months with the Division, Mr. Goodstein was assigned as the lead attorney of the Division iniated complaint unit, the statistical systemic arm of the Division. Since October 1981, Mr. Goodstein has been in private practice. His case load is almost exclusively employment discrimination litigation. Mr. Goodstein has written an article on employment discrimination and has been a guest lecturer at St. John's University of Law speaking on employment discrimination.

Mr. Goodstein was retained by the plaintiffs prior to the commencement of the lawsuit and has been in constant contact with large numbers of the class

members. He has attended at least five (5) large (50+) public meetings with class members as well as many smaller meetings. He has been in telephone contact with at least twenty five (25) individual class members and has been in daily contact with both the leadership of the Guardians and with specific class members, other than named parties, who were elected to represent the group.

Immediately prior to negotiations on the settlement over thirty (30) class members ratified Mr. Goodstein's negotiating position, and the settlement was ratified unanimously at a December meeting at which over one hundred class members attended.

WHEREFORE, I request that the plaintiffs be certified as proper representatives representing the class of black candidates who took Examination

#2548, together with such other and further relief as to the Court seems just and proper.

Dated: New Rochelle, NY April 10, 1986.

[Endorsement omitted]

Affidavit of Kimmerling in Support,
U.S. Dist. Court, So. Dist. N.Y.
USDC, SDNY [Caption & Jurat omitted]

KENNETH KIMERLING being duly sworn deposes and says: 1. I am an attorney for plaintiff Hispanic Society et al., in the above referenced matter and submit this affidavit in support of the proposed settlement.

2. The settlement in this case resemples closely the settlement in Hispanic Society v Civil Service Commission, 80 Civ. 5603 (RLC) previously approved by this Court. Guardians Association v Civil Service Commission, 527 F.Supp. 751 [SDNY 1981]. Challenged in the complaint in the Hispanic Society case (84 Civ. 6628 RLC) as well as the complaint in the Guardians Association case (84 Civ. 8504 RLC), which the settlement proposes to be formally consolidated, is Examination No. 2548 for

Sergeant in the New York City Police Department. The complaints allege, inter alia. that examination #2548 had a disparate impact on Hispanics and blacks and is not job related and thus violates Title VII, 42 USC Sec. 2000e. et seq.* [*fn: Attached is the affidavit of Dr. James Outtz that discusses the statistically significant disparate impact of the examination and his findings that the examination has not and cannot be shown to be a valid job related examnination.] The settlement allows the defendants to continue to make appointments from the results of the examination as long as they are made in a nondiscriminatory basis. Under the terms of the agreement, 8.7% of those promoted to sergeant must be Hispanic and 12.3% Black. [See paragraph III B and C of the Settlement]. These ratios are the

precentages of police officers who took the examination who were hiIspanic and Black. Those Hispanic and Black police officers who are promoted at the end of 1984 will receive partial back pay and retroactive seniority. [See paragraph IV A and B of the Settlement.]

3. The considerations involved in revieing the adequacy and fairness of the proposed settlements of employment discrimination cases are well known to the Court. They include, inter alia: a) whether or not the settlement is collusive or the result of arm's length negotiations; b) whether counsel for the class is experienced in similar matters; c) Whether there has been sufficient discovery to enable counsel to act intelligentaly; and; and, d) whether members of the class objected or whether otheers have objected to the settlement

and their relative interest. I will address these considerations in turn Arm's Length Negotiations: 4. The settlement of the case was the result of arm's length negotiations. There was no collusion in obtaining this agreement.

5. After it was clear to all concerned thatt plaintiffs' class were very strong, counsel for all the prties including Intervenor Hyman, et al., began meeting in the fall of 1985 to seek resolution to the issues presented in the complants. Negotiations continued through the winter until the final agreement was reached at the end of January, 1986.

6. The negotiations were at times difficult with all parties having to make consessions to form the final package. At one point when the major issues had been largely resolved, all the parties

agreed to the issuance of an Interim Order allowing for provisional promotions of all who had obtained a passing score on the test as well as additional Hispanic and Black police officers. This Interim Order was signed by all the parties except counsel for Intervenor Hyman who was unabailable to sign it but did not oppose the order.

7. At the time of the Interim Order the Court met with counsel for all the parties and was informed of the status of negotiations. Later on january 8, 1 986, the Court again met with counsel at whch the terms of settlement were again discussed.

8. Both the process of negotiations as well as its terms, discussed below, demonstrate that the settlement is not collusive but a fair and reasonable settlement of the claims.

Experience of Counsel: 9. All the attorneys involved in this settlement are experienced. As the Court knows, counsel for defendants, Judith A. Levitt, counsel for Intervenor Francis Shields et al and the Sergeants Benevolent Association, Richard K. Walker, and I were consel for similar parties in the settlement involving the previous sergeants examination. Hispanic Society v Civil Service Commission, 80 Civ. 5603 (RLC). In addition counsel for plaintiffs the Guardians Association case, Robert Goodstein, is an experienced employment discrimination attorney. Counsel for the Intervenor Douglas Almskog et al and Exam No. 548 Sergeant Eligible Association, Raymond J. Aab, is an experienced federal court litigator with prior experience in matters involving the police department. Finally, Adam Ira

Klein, Mr. Walker's co-counsel, is the retained counsel for the Sergeants Benevolent Association with extensive knowledge of Police Department matters.

10. The experience and expertise of counsel insures that members of the plaintiff class in the Hispanic Society case, as well as the proposed plaintiff class in Guardians Association case, were fairly and adequately represented. In addition the Court can be assured that the rights ofthe intervenors were well protected. The interest of the public was protected by defendant Police Department and the City of New York.

Extent of Discovery. 11. Prior to settlement, the parties had engagedin extensive discovery. Depositions were taken of almost all those in charge of the preparation and administration of the sergeants examination. These included

Dr. Frederic Frank, from Assessment Design, Inc. who was principally in charge of the development of the examination. His deposition laster for five days. Dr. Frank's associate Joseph T. Sefcik, Jr., who did much of the work on the examination, was deposed for seven days and another associate Roberrt Adams was also deposed. Four people from the Department of Personnel were deposed who were involved in the preparation and administration of the examination: Dr. Judith Piesco, Deputy Personnel Director for examinations; Robert H. Brophy, Jr., Chief of Test Administration; Stephen Dobrowsky, Chief of Police Service Division; and, one of his subordinates, Robert Lehman. Numerous members of the Police Department werre deposed including Lt. Vincent Mansfield, Cptain Leonard Kaplan, Captain Edward Rybak, Jess

Maghen, head of the Police Academy, and five sergeants who wre consulted in the preparation of the examination.

12. In addition therewere thousands of pages of documents produced. They fill over two file draws in my office.

13. Discovery was conducted over a period of time beginning in late 1984 through the begginning of the summer of 1985.

14. In addition all the major parties had the assistance of experts in reviewing the discovery. My office retain two psychologists. Mr. Goodstein retained a psychologist. Finally, the City retained an independent expert to review the work done by the test maker.

15. At the time settlement discussions began, the parties wre able to measure the strengths and weaknesses of their own litigation position as well

as those of their adversaries.

Objections: 16. There have been no objections filed by the plaintiff classes to the proposed settlement.* [fn: Two purported members of the plaintiff class in Hispanic Society have filed written statements claiming to be Hispanic and thus entitled to the class benefits. They do not oppose the settlement.] The resolution obviously advances the interests of all Hispanic and Black police officers in obtaining promotions to sergeant through non discriminatory means. While compromises wre made in claims for full back pay, no plaintiff class member has objected.

17. Nor have there been objections filed by members of the proposed intervenor classes. These classes obtained the promotions that they sought although their seniority was diluted in

part by the additional minorities to the group of provisionally appointed sergeants.

Intervenor Hyman has filed an objection to the settlemen. This group of intervenors is composed of seven police officers who scored above the cutoff point on the examination and several non minority police officer orgnizations. In a rambling and bitter diatribe, intervenors' attorney Peter Schneider condemns the settlement for dismantling the civil service system but never specifies the injuries suffered by his clients. Mr. Schneider's additional charge of reverse discrimination is not supported by reference to any facts nor citations to any law.

19. Lastly, numerous nonminority police officers who were not on the eligible list object not to the

settlement itself but the fact thay there were not included as its beneficiaries in the same manner as Hispanic and Black police officers. Many of the written objections tell about the objector's disappointment in not being promoted to sergeant. In evaluating the weight to be attached tothese "objections," the Cpurt must consider the interest that these police officers had in the matter and the other alternative resolutions that were available.

20. The parties to the settlement, particularly the City defendants, had to make a difficult decision which would not satisfy everyone's interest and concerns. In light of the defendants' acknowledged inability to defend the test, the primary decision to be made was (1) whether to scrap the test completely, make no promotions and rescind the approximately

500 provisional promotions that had been made, or (2) whether to make promotions but according to ratios that would eliminate the discriminatory impact on Hispanics and Blacks Weighing in favor of the first choice was the City's and particularly the Mayor's abhorance of quotas based on race or ethnicity. Weighing in favor of the second choice was the need of the Police Department to fill its many vacant sergeant positions - almost half of the authorized number of positions were vacant of filled with provisionals from this examnation. By choosing to use nondiscriminatory ratios, the City would be able to avoid demoting those who it had alreay provisionally appointed. in addition, those who were on the eligible list had realistic, although legally unforceable, interests and expectations of promotions. It was

obvious to all concerned that the scraping ofthis list and the attendant demotions would have a demoralizing effect on the whole police Department. While the choice was a hard one, the practical considerations outweighed the political and policy concerns of the City.

21. The police officers who are objecting, were not on the original eligible list. They had no expectation of being promoted. For those nearing retirement, the decision to retire or remain on the force would have had to be made in any event. If anything, these objectorshave benefited from the settlement and the lawsuit as a whole. While litigated over a reletively short perriod of time, a little over a year, the lawsuit and the settlement has delayed the giving of a new sergeants

examination. This may mean, as it did in the settlement of the 1978 test, that the Police Departments continuing need for sergeants will cause the City to lower the existing cutoff point. Thus, some of the objectors may be added to the eligible list and promoted to sergeant. This would not have happened had this 1983 test not been challenged. It was the intent of the Police Department to give a new test in 1985, thus there would be no chance of a lowering of the pass point to get additional sergeants.

22. Moreover, the effortsby plaintiffs to show that the test was not job related may assist in the ongoing state court challenges to individual test items, called Acosta hearings. One third of the technical knowledge questions, the first part of the examination, are being challenged in those hearings, and almost

half of the job sample questions. There is a good chance that many of the objectors will benefit from these state court proceedings and get scores over the cutoff point. Because of the bunching of scores, particularrly on the Job Sample test, many police officers are very close to the passing point. For example on the Job Sample test given in June 1983, there are approximately 6,000 candidates within 6 points of passing. Of the approximately 1,000 candidates who opted to take the April 84 makeup Job Sample, there are 500 candidattes within 5 points of passing. (There were some technical difficulties in administering the June 1983 Job Sample test because of the use of video presentations. The City allowed anyone ho obtained a 60% on the written Technical Knowledge test to take the makeup April 1984 Job Sample.)

Similarly, there are approximately 230 police officerswho got above the cutoff score ont he Technical Knowlede test and were just one point below the cutoff on the Job Sample. Thus, although some of the objectors write about giving up hope, there is reason to believe many will be appointed.

23. Finally as a result of the lawsuit, the United States Justice Department has retained two experts to assist the City in preparing the next examination. In addition the Puerto Rican Legal Defense and Education Fund has also retained an expert and has made him available to asist the City. The mutual desire of all those concerned is that the next examination will be a job related examination. This will be of benefit to all police officers, including the objectos who areseeking to be

promoted to sergeant.

24. The relief requsted by these objectors, promoting all who scored the same as some of the minority officers who were promoted, cannot be provided. The City does not doubt their qualifications, but there simply are not enough sergeant's postions to be filled for every qualified cndidate. While some may be promoted as I discussed above, all cannot be. Moreover, because of the ratios that the settlement requires to be used for all promotions, if additional nonminority police officers are promoted, the more minority officers would also have to be promoted. Thus, it would create another group of "objectors" who would feel bypassed by the additional minority police officers.

25. Many of the objectors including Intervenor Hyman have challenged the

legality of the provisions of the settlement. As plaintiffs' memorandum of law makes clear, the settlement is consistent with existing precedents.

26. As is evident, the settlement is fair and adequate. It is an equitable result that eliminaes any disparate impact on Hispanic and Black police officers while not creating any disparate impact on any other group. it is a settlement that furthers the public interest through the appointment of qualifie sergeants to fill the great need for these men and women in the Police Department. Moreover, it benefits the good order and morale of the Police Department, byavoiding a decision which would have dmoted over 500 provisionally appointed sergeants and denied promotion to another 500 on the eligible list. As counsel for plaintiffs, I urge the Court to aprove the setlement in all respects. April 11, 10986 [Endorsement omitted].

Affidavit of Outtz in Support of Settlement. District Court Southern District of New York. [caption omitted]

James L. Outtz, being duly sworn deposes and says that:

1. I am an industrial psychologist licensed in the District of Colubia. I haold a Ph.D. in industrial psychology from the University of Maryland. I am a member of the American Psycological Association and serrved as an advisor to the committee of that organization which recently published revised Technical Standards for Educational and Psychological Testing (Hereinafter, the Technical Standards. (fn: **Standards for Educational and Psychological Testing,** American Psychological Association, Washington D.C. 1985). I have testified as an expert witness in many Title VII cases including cases involving the use

of employment selection procedures for law enforcement positions. A copy of my resume is attached hereto.

2. I have been retained by Counsel for the Hispanic Society plaintiffs to offer an opinion with regard to the validity of examination 2548 (a promotional examination for Police Sergeant) and the degree to which the eligible list derived from that examination complies with the requirements of the Uniform Guidlines on Employee Selection Procedures, (hereafter the Uniform Guidelines) and requirements set forth in the Technical Standards. (fn. **Uniform Guidelines on Employee Seclection Procedures,** 43 Fed. Reg. 38290-38313)

3. I have reviewed documents supplied by Counsel which describe the procedures used to develop, administer

and score examination 2548, and formulate Eligible List 2548. Those documents include: a) Copies of the Examination, including test booklets and videotapes. b) a copy of the job analysis report prepared by Assessment Designs inc., the consultants responsible for development of the examination. c) Transcripts of the depositions of those persons from the City of new york, and Assessment Designs, Inc., who were involved in the development and administration of the Examination. d) an item analysis of the Examination results. e) raw scores of the candidates.

4. Having reviewed the documents listed above, I have made the following conclusions with regard to Examination 2548 and the associated Eligible List (2548):

a) based upon a statistical test known as Chi-Square, which is widely recognized within the profession of industrial Psychology, the manner in which Examination 2548 was used had a statistically significant adverse impact upon Black and Hispanic candidates for the position of Police Sergeant. Approximately 12,000 Police officers took Examination 2548, of whom only 1041 were placed on the Eligible List. Blacks made up approximately 12% of those taking the examination but only 2.3% of those on the Eligible List. In like manner, Hispanics represented approximately 8.7% of those who took Examinatin 2548, but only 4.2 percent of those on the Eligible list. On the other hand, Whites made up approximately 79% of those taking the Examination and 93.5% of those placed on the Eligible list. The disparity between

the success rate of Blacks and whites is statistically significant at the point .001, level meanint that it could have occurred by chance less than one time in ten thousand. The disparity between the success rate of Hispanics and Whites is also significant at the .001 level. Acording to the Uniform Guidelines on Employee Selection Procedures, Examination 2548 must be demonstrated to be valid, in order for its use to comply with Title VII. That demonstration of validity should include a showing that the passing score for the Examination was set reasonably, and is consistent with normal expectations of work proficiency (see Sections 14C and 15C of the Uniform Guidelines.) The Technical standards specify that validity refers to the accuracy of the inference(s) made on the basis of examination scores, and is not

the property of the Examination itself (see, Technical Standards at PP. 9 & 13). Thus, in order to demonstrate the validity of Eligible list 2548, it must be shown that the one thousand or so candidates on that list are demonstrablv more qualified for promotion than the remainder of the candidates.

5. Based upon a review of the examination and related documentation, it is my opinion that its use in formulating Eligible List 2548 has not and cannot be demonstrated to be valid. First of all, the cutoff point for establishing the Eligible List was set arbitrarily and not on the basis of inferences demonstrated to be accurate. secondly the job analysis upon which the examination is based, is significantly flawed in that the areas of knowledge and ability

intended to be measured by the examination are not identified with sufficient specificity and clarity to allow knowledgeable experts to accurately judge the relations of items to the job domains they represent (see Technical Standards, Standard 3.3). Furthermore the content domain shuld have been more clearly defined basedupon a more thorough job analysis (see Technical Standards, Standard 10.4). Unfortunately, the inadequatte job analysis conducted in connectioon with Examination 2543 caused examintion questions to be written which covered areas of knowledge not demonstrated to be important to job success. This fact, courpled with the poor quality of several segments of the examianation (i.e. the videotape portion of the job sample test) significantly reduced the fidelity with which the test

sampled job content, a critical requirement by accepted professional standards (aee Technical Standards, Standard 10.5).

6. Given that examination 2548 has not been demonstrated to be valid for the manner in which is was used, and the Eligible list derived from examination scores has an adverse impact upon Black and Hispanic candidates, the Uniform Guidelines require that the examination be eliminated, or its use modified in such a manner that the adverse impact is removed (see uniform Guidelines, Section IV at P 38291).

7. The proposed settlement between the parties in this case provodes for a sound method of modifying the use of Examination 2548 so that adverse impact is eliminated, yet the validity of promotion decisions (i.e. the accuracy of

inferences made regarding those promoted) is not distorted in such a manner that whatever utility the examination has, is destroyed. [Endorsement omitted.)

Exhibit:Resume omitted. ****.

Affidavit of Levitt in Support

District Court Southern Dist. N.Y.

[Hispanic caption . ' jurat omitted]

Judith A. Levitt being duly sworn deposes and says:

1. Since February 1, 1986, I have been serving as the New York City Personnel Director and am the head of the New York City Department of Personnel. Prreviously, I was Chief of the General LitigationDivision in the office of the Corporation Counsel of the City of New York. In the latter capacity i represented the defendants in the defense of this action from its inception. I am fully familiar with the facts and the prior proceedings in this case. I submit this affidavit in support of the proposed Stipulation of Settlement hereein.

2. at the time this litigation was commenced, both the Corporation Counsel's

Office and the Police and Personnel Departments anticipated that Examination No. 2548 for Police Sergeant would meet prevailing Title VII standards for "professionally developed ability tests" because it had been designed by a professionl independent consultant hired by the City specifically for that purpose who was chosen with the active participation of the plaintiffs.

3. During the process of discovery, the Corporatin Counsel's Office, in conjunction with the Police and Personnel Departments, collected and analyzed the thousands of pages of records that had been created or used during the development of the test. We confered with the test developers at length. We met with every person who had been involved in any substantial way in the development of the test, as well as with most of

those who had been periferally involved. As the evidence accumulated, we began to have serious concerns about the defensibility of the test at trial, given the high standrds of proof requird.

4. We presented our concerns to he Police and Personnel Departments. At the suggestion of the latter, we retained an independent testing expert to review the evidence. After painstaking review all of the documents and depositions and meetings with the test developer and Department of Personnel staff, the independent expert also had serious concerns about our ability to muster the proof required to uphold the test under Title VII.

5. Based on all of these factors, plus the lack of documentation for some phases of the test development and the fact that a final result could not be

obtained in litigation for a substantial period of time, we recommended that the case be settled. Three alternative solutions were proposed and explored: (throwing the test out, demoting the provisionals already promoted off the list and postponing any more promotions until a new test could be given and a new list promulgaated; (2) establishing a new, much lower cutoff score representing minimum compentency and choosing new sergeants by lottery from among all candidates who scored above the new cutoff (this too would have meant demoting the more than 500 provisionals and leaving it to chance whether they or any of the other candidates on the eligible list would be chosen for permanent appointment); and (3) continuing to make promotions in rank order, but subject to quotas for Blacks

and Hispanics, set according to their proportions within the pool of test takers and filled in rank order by going below the cutoff score. Both the Police and Personnel Departments and the Corporation Counsel's office recommended the later to mayor Koch. Either of the other alternatives would have caused major problems in morale and discipline within the police force. Abandonment of the eligible list would have sapped motivation across the board and stifled the career commitment necessary to keep dedicated officers. Demotion of the provisional sergeants would have put them in an intolerable position and undermined the authority of any supervisors appointed provisionally in the future. Most alarming of all, under the first alternative, the Police Department would have been forced to

operate with a severe and mounting shortage of sergeants, the essential fist line supervisors, for an underterminable amount of time until a new test could 'be given. This would unquestionably have caused a serious threat to public safety at some point. In contrast, the quota system preserves rank ordered promotions to the greatest extent possible and, in this case, hand the least negative impact on those who had successfully competed on the exam.

6. It is not true, as is suggested by the attorney for the intervenors Robert Hyman, et al., that we will have to promote people who "failed" the the test in order to fill the quotas in this case. The original cutoff score did not define the minimum levels of knowledge and ability necessary for competent performance on the job. It was set

solely by the number so sergeants the Police Department expected to promote fromt this list before the next list, from this list before the next list, from the next examination, would be ready. The fact that candates are being promoted who scored below the original cutoff does not mean that they are not qualified to do the job.

7. In providing for additional promotions under the quotas, however, it was necessary for us tto modity the eligible list in one respect,in order to avert possible irreparable injury to some candidates. The additional promotions are being made in rank order according to the candidatt's scores on only the technical knowledge portion of the test, not on their combined scores on both the technical knowledge and the job sample (video) portions.

8. This was necessary because some candidates may not have had a fair opportunity to take the job samle test. The administration of the test in June 1983 was hamptered by serious mechanical difficulties in broadcasting the video portion . As a result the Department of Personnel decided that the affected candidates who scored above 60% ont the technical knowledge test should be allowed to retake the video portion, which was readministered without incident in April, 1984. the figure of 60% was chosen with several factors in mind. The eligible list from the examination as a whole was expected to be limited to the top 1,000 or soscorere, the number the Police Department expected to need over the expected life of the list. Those 1,000 candidates were expected to have achieved technical knowledge scores well

above 60%. Therefore, candidates scorring below 60% on the technical knowledge test were believed to have noo realistic prospect of earning a place on the eligible list, and they were not permitted to retake the video portion of the test, even though their video scores might have been completely invalid because of the poor quality of the broadcast

9. So far, we have not reached below the 60% score on the technical knowledge test in order to fill the quotas called for by this settlement. However, it may become necessary to do so in the future if a sufficient number of non-minority candates are added to the original eligible list as a result of pending state court challenges to the correct answers. In that case, we would not have a valid combined score for those

candidates who had experienced broadcast diffculties on the video test but had a score below 60% on the technical knowledge test. The only way to avoid penalizing those candidates was to use technical knowledge scores alone to rank order all minority candidates who were not on the original eligible list.

10. The testing experts at the Department of Personnel recommended tthis course of action because combining the technical knowledge and the job sample scores would have meant going much lower on the list to fill the quotas, and they believe the technical knowledge test has greater differentiating power than the job sample test.

11. a number of the individual objectors to the proposed settlement believe that the score of 60% on the technical knowledge test represented the

original pass mark for that test. They complain that the cutoff point for the final eligible list was based on a higher technical knowledge score, and thus the defendants "raised the pass mark in midstream". This is not true. The Department of Personnel which sets the cutoff score, did not determine at any time that 60% represented a passing score on the technical knowledge test. Unfortunately, one Police Department notice did go out to that effect, but it was in error. While the defendants regret the misinformation, it is not grounds to reject the proposed settlement herein. Even if the pass mark had been raised before the final list was drawn up, the objectors would gain no advantage by rejecting the proposed settlement, because the settlement does not alter the cut-off score for non-minorities. The

proposed settlement does not raise the pass mark on the technical knowledge test, and rejection of the settlement would not lower it to 60% or any other level.

12. Another group of objectore, represented by Ronald Podolsky, Esq., alleges that before the final list was drawn up, the defendants raised the passing grade on both the technical knowledge and the video portion of the exam, thereby "artificially" creating a racially disproportionate impact and triggering this lwsuit. This is not only untrue, it is nonsensical. In the first place, the passing grades were not set at one level and then raised, for either portion of the test. Secondly, at every score that could be considered above minimum competency, the test showed a disparate impact on blacks and Hispanics;

there was no way the defendants could avoid creating a list with racialy disproportionate results sufficient to trigger a presumption of discrimination under Title VII. Finally, it efies reason and common sense to suppose that the city would deliberately go out of its way to foment a lawsuit that would seriously handicap a vital City sservice agency and disrupt the regular promotin route for hundreds of its employees.

13. These objectors also allege, again without any fondation in fact, that the defendants rerated the examination in November 1985 because some questions on both the technical knowledge test and the video test were discovered to be not job related, but that the benefits of the rerating were not extended to all candidates. There is absolutely no truth to this assertion. No questions on the

exam have been found to be nonjob related, and no retating has been done based on the exclusion of specific questions from the exam (except for .two questions challenged before the final list was drawn up). Even if these allegations were true, they would have no bearing on the proposed settlement, which does not Provide for any such alleged rerating.

14. The proposed settlement represents the most equitable reconciliation of the claims of the plaintiffs, the interests of those on the eligible list, the needs of the public and the Police Department, and the requirements of law. I respectfully request that it be approved by the Court. [Endorsement omitted]

Supporting Affidavit of Koch, April 15, 1986, U.S. Dist. Court, So. Dist. N.Y.

[Caption & Jurat omitted].

EDWARD I. KOCH, being duly sworn, deposes and says: I am the Mayor of the City of New York ("the City") and its chief executive officer.

2. I submit this affidvit in support of the proposed Stipulation of Settlement and Order in the above captioned cases and to substantiate the facts and circumstances which, in my opinion made this settlement both necessary and desirable for the good of the City.

3. When these lawsuits were started in the fall of 1984 I was determined to fight to uphold the examination for police sergeant Exam No. 2548, against plaintiffs' claims that its results were discriminatory because all relevant City

officials believed that the exam would turn out to be defensible.

4. After extensive discovery, however the consultation with experts in employment testing, the Corportation Counsel's Office came to the conclusion that if we went to trial in these cases, we would run a substantial risk of losing. i was advised that Title VII places a very high burden of proof on employers seeking to make promotions in strict rank order on the basis of test results, when those results show a disparate impact on minorities. Although the Corporation Counsel's Office believed that the examination measured some aspects of the job and thus had some value, they concluded that they could not meet the stringent Title VII standards.

5. I was also informed that the United States Attorney's office for the

Southern District of New York, which had intervened as a plaintiff in previous cases of this type, had determined that this examination was indefensible under prevailing Title VII standards.

6. If we had proceeded to trial and lost, the consequences to the City and the Police Department would have been disastrous. We could have been precluded from making any promotions from the eligible list for Exam 2548. The 500+ sergeants already promoted provisionally would have had to be demoted, and they and all the other police officers who had earned a place on the eligible list would have had to retake the next available qualifying exam if they wanted to be considered for promotion. This would have seriously undermined morale and disrupted the orderly career progression necessary for the Police Department to

attract and keep dedicated and qualified supervisors. Even more alarmng is the severe shortage of sergeants that would have resulted. With vacancies accruing at the rate of about 20 a month from attrition, we calculated that by this writing, the Police Department would have been operating with more than 1,500 vacancies in the rank of sergeant, including the 500+ positions vacated by demoted provisionals. This would represent over 50% of the Police Department's budgeted strength in that rank. Such a depletion in the rank of sergeants would expose the citizens of this City to an intolerble risk to public safety and welfare.

7. Another alternative, provided we could obtain the agreement of the other parties and the approval of the court, would have been to abandon rank order,

establish a new, lower cutoff score representing minimum acceptable competence, and make promotions by lottery among the candidates scoring above the minimum. Here too, the more than 500 top scoring sergents who had been promoted provisionally would have to be demoted, and there was no assurance that they -- or, for that matter, any of the other successful candidates on the current list -- would be picked in the lottery among the 3,000 - 5,000 new eligibles. Cpmmon sense also told us that if th.s exam has any validity -- and we believe it does, even thoe it is insufficient to meet the strict Title VII standards -- we shold promote first those who got the most answers right, rather than settling for minimum competence.

8. The only way we could substantially retain the benefits of rank

order and avoid the unacceptable risk of trial was to accept the quota system contained in the proposed Stipulation of Settlement. Under this settlement, all those on the existing eligible list would be promoted in rank order, and enough additional black and Hispanic candidates would be added, in order of their scores on the technical knowledge test, to match the racial and ethnic breakdown of the pool of test takers.

9. I approve this settlement despite my long standing opposition to quotas. I have long been convinced that quotas are a two edged sword, that no matter how desirable they may appear to some, they exact a price from everyone. They are devisive and increase resentment and hostility between groups. They perpetuate the pernicious notion that each identifiable group in society is

entitled to some fixed percentage of society's benefits, a notion that is completely contrary to the concept of individual opportunity. They do not even reliably address the problems of inadequate education, financial need, or poor job skills because these handicaps are not synonymous with membership in any particular minority. Most insidious of all, they convey the subtile message that the "beneficiaries" of quotas, and every other member of the group, couldn't make it on their own. Thus quotas reinforce negative stereotypes that ignore individual merit and promote bigotry.

10. I am committed to eradicating every form of discrimination and every barrier to individual achievement. I do not regard quotas as a preferred method of achieving those goals. Nonethheless, in this case quotas represented the least

undesirable alternative for resolving an otherwise insurmountable problem. I determined that the public interest would be best served by a settlement that permitted us to resume promotion of qualified candidates quickly and put these disputes behind us. For all of the aforementioned reasons, I authorized the proposed Stipulation of Settlement, and I urge this Court to Aprove it.

April 15, 1986. s/Edward I. Koch

Affidavit of Shields in Support
U.S. Dist. Court, So. Dist. N.Y.
[Caption & Jurt omitted]

FRANCIS M. SHIELDS, being duly sworn, deposes and states as follows:

1. My name is Francis M. Shields. My residence is in Northport, Long Islans, New York, and I am currently employed as a provisionasl Sergeant in the New YorkCity Police Department ("NYCPD"). I was a member of hte Ad Hoc group of provisional Sergeants formed in approximately Mrach, 1985 and have been a member of the Steering Committee since its formation bythe e Sergeants Benevolent Association ("SBA").

2. I have served on the New York City Police force for more than 17years. My appointment to the NYCPD was on October 25, 1968, and I was promoted to Detective Investigator on July 3, 1977. On December 23, 1983, I received a promotion to Detective 2nd graade, and

was provisionally promoted to Sergeant on October 2, 1984. During my period of service a a police officer and deytective, i have worked in various patrol precincts in the Narcotics Division of the Organized Crime Control Bureau for approximately seven years, and in various investigative units ofthe Deterctive Bureau. I have bbeen awarded 40 departmental recognitions.

3. In June of 1983, I took Examinatin No. 2548 to qualify for consideration for promotiion to the reank of Sergeant in the NYCPD. I was notified that I had scored 94.44 on the technical knowledge portion of the examination and 78.66 on the applications portion of the examination for an adjusted final score of 95.39. When the Eligibility List was established, I was listed as Number 21 on the eEligible List of 1,041 candidates. After my provisional promotion to Sergant

on October 2, 1984, I immediately became a dues paying member of the SBA.

4. After my provisional promotion, I was assigned for approximately one year as a Uniform Patrol Supervsion in various precincts and in October, 1985 was assigned as the Robbery Supervison in the 75th precinct. My current assignment is as Sergeant Supervisor in the 77th Precinct Detective Unit, which is part of the Deytective Bureau. During my service as a Provisional Sergeant, I have been recommended for or have received three departmental recognitions.

5. It is my understanding that the Police Department takes the positon that a provisional Sergeant can be immediatly demoted without a hearing process or other protections. This uncertain status makes me and other provisional Sergeants feel insecure in out position and, since police officers in the Departmentt are

aware of the lack of sucurity in a provisional Sergeants' status, serious supervisory problems are created. The problem is especially serious on patrol duty where control and discipline contact occurrs more frequently and were the police officer being supervised believes that the provisional Sergeant giving him orders may be reduced in the ranks tomorrow. As noted below, I am in continual contact with numbeous other provisional Sergeants and, therefore, i am awatre that the problems that I have described are similar for provisional sergeants throughout the Department. Addditionally, the prosivisonal Sergeants Whom I have contacted have expressed a sense of frustration, which I share, because of the continual stress created by our inability to plan our future careers in the NYCPD and because of the constant questioning of us by friends,

rleatives. and collegues in the Department. Dealing with these prolems not only hurts me and the other provisional Sergeants but also hurts the efficient operation of the police force.

6. When serious settlement discussins commenced between the parties, the Steering Committee began to have frequent meetings with counsel retained by the SBA in order to discuss the issues raised by the settlement discussions so tha the Steering Committee could give directions to the attorneys representing the intersts of the provisonal Sergeants. As we received updated informatain on the process, I made personal telepone contact with provisional Sergeants assigned to the Brooklyn North area. I would speak to up to 50 Sergeants, apprise them of the updated information, and obtain their views. They would in turn tell me of their problems and give me thier views on

how we should proceed with the seyttlement discussions. From my experience on the committee I believe that we were apprised of all actions being taken of changes that occurred during the negotiatin process and that our counsel complied with the directions given by the Steering Committee. I believe that counsel retained by the SBA vigorously and competently represented the intersts of the provisional Sergeants in this litigation.

7. I am familiar with the terms of the settlement and, as described above, I am well aware of the circumstances currently existing in the NYCPD as they affect me and the other provisional Sergeants. Although many of the provisional Sergeants I spoke to and I are not, as a general matter, in favor of the use of quotas for promotions, I believe that given all of the

considerations involved here that the settlement is fair and equitable under the circumstances. I further believe, and the provisional sergeants whom I contacted expressed the belief, that approval of the settlement would be in the best interest of the clas of provisional Sergeants as a whole.

8. This affidavit is submitted in support of yhe final approval of the settlement provisionally approved by the Court in the above styled cases and the facts state herein are true and accurate to the best of my information, knowledge and belief. [Endorsement omitted]

Affidavit of Pulaski in Support
U.S. Dist. Court, So. Dist. N.Y.
[Caption & Jurt omitted]

1. My name is Phil T. Pulaski, and I live in North Bellmore, New York. I am currently employed as a provisional Sergant in the New York City Police Department ("NYCPD"), and I am one of the group of Sergeants promoted to that position on or before December 28, 1984.

2. In about March, 1985, an Ad Hoc group was formed, consisting of Sergeants provisionally promoted on or baefore December 28, 1984. The purpose of the group was to communicate the concerns of the provisional Sergeants as a group regarding this litigation and its potential impact on the provisional sergeants to the Sergeants Benevolent Association ("SBA" and to other appropriate officials and organizations. Later, a Steering Committee was formally established with the Vice President of

the SBA servicg as Chairman. I was a active participant in the Ad Hoc group of provisional Sergeants and have been a member of the Steering Committee since its formation. Based on discussions beytween the provisional Sergeants and the SBA, the SBA moved to intervent in the two above styled cases on behalf of the Sergeants who had been provisionally promoted on or before December 28, 1984.

3. Prior to entering in service with the NYCPD in Septembrer, 1980, I received a Bachelor of Engineering degree in Chemical Engineering in 1974 and Master of Engineering degree in Civil [Environmental] Engineering in 1976 from Manhattan College and received a Juris Doctor degree from St. Johns University Law School, evening division, in 1980. I worked for 4 1/2 years as a Senior Engineer for the Environmental Protection Agency from 1976 until my appointment in

the NYCPD in 1980. In the approximately 5 1/2 years that I have served on the police force, I have served as a probationary police officer in Recruit Training at the Police Academy, as a police officer in various precincts and, since October, 1981 have been asigned to the Legal Bureau of the NYCPD. In March of 1984, I was promoted to the rank of Detective and on October 12, 1984 I was granted a provisional promotion to Sergeant. During my service on the police force I have received 11 depatmental recognitions.

4. In June of 1983 I took the technical knowledge portion of Examinatin No. 2548 to qualify for consideraton for promotion to the rank of Sergeant in the NYCPD. I as unable to take the job sample portion of the examination at that time because the TV monitor to be used for that portion of the examination was

broken. In April, 1984, I took the job sample portion of Examination No. 2584. After completion of the exam I was notified that I had scored 93.33 on the technical knowledge porition of the examination and 88.88 on the job sample portion of the examination and that my adjusted final average score was 88.54. I was listed as Number 203 on the Eligible List. After my provisional promotion to Sergeant on October 12, 1984, I immediately became a dues paying member of the SBA.

5. I have continued to serve in the Legal Bureau of the NYCPD since my provisional promotion to Sergeant. My present position is as an attorney in the Legal Bureau, which operates as legal counsel for the Police Commissiner. In that capacity, I provide legal advice to members of the NYCPD, and, in addition, I have been designated as Legal Advison for

the Organized Crime Control Bureauaand the Intelligence Division. During this time I have been recommended and approved for two departmental recognitions: one for meritiorous and one for excellent police duty.

6. The circumstances under which the other provisional Sergeants and I were promoted have created a nubmer of problems for us and for the efficient operation of the police force. It is our understanding tht the Department takes the positon that provisional Sergeants are not entitled to the same rights and procedural protections as Sergents with permanent promotions. In effeect we are on constant probatin and have been given the understandin that any breach of rules could result in demotion without the minumum of procedural protectins. This concern is a particular problem for me as a lehgal advisor since all of the calls I

receive are serious problems requiring judgment calls on close questions. Second, in my position, I, on occasion go out on uniform detail and it has een my experience that as a provisional sergeant I do not get the same amount of cooperation and respect from all of the police officrers since some believe that they might have muy shield and be wearing my stripes after the next examination. Third, there is a constant stress opof not knowing whether I need to pre@pare for another Sergeants' examination or whether I should be spending my time preparing for an examination for the next higher rank. This is particularly frustrating since I have already qualified under one Sergeants' examintion. Fourth, the Polie Department is particularly rank conscious, and there is a certain amount of ribbing from other members of the police department

concerning our status. While intended, for the most part, to be humorous, the cummulative effect of such comments tends to make a person insecure in his or her position and sometimes causes one to be overly cautious.

7. As a member of the Ad Hoc group and of the Steering Committee I have been in contact with over 100 provisional Sergeants. I have either spoken to or been in contact with provisional Sergeants in every precinct of the patrol Boroughs of manhattan South and Manhattan North and with almost every precinct in the patrol Boroughs of Brooklyn South and Brooklyn North. In addition I have been in contact with the provisional Sergeants in the Detective Bureau and the Organized Crime Control Bureau of the Department. I would estimate that I have had substantial contact with well over 200 of the provisional Sergeants originally

promoted on or before December 28, 1984. Based upon these contacts I am aware that the other provisonal Sergeants have experenced problems similar to the ones that I described above. In fact, for the Sergeans who are on patrol the problems are more severe because of the need to maintain control and discipline. There the disciplinary contact is more frequent, and concerns about the problems of provisional sergeants on patrol have been voiced to me over and over again by other provisional sergeants. Moreover, the high number of vacancies that have existed in the sergeant ranks since these cases have filed have created additional pressures on provisional Sergeants serving on patrol duty because they often have to fill two positions in a precinct covering both desk sergeant duties and patrol sergeant duties. Further, the schedules set for sergeants on patrol

duty is such that it is next to impossible for them to set aside time for studying for another exam is one were given.

8. After the parties to this litigation began serious negotiatins in an effort ot work out a settlement, the Steering Committee met frequently with counsel retained by the SBA to represent the interest of provisional Sergeants. At those meetings counsel set forth the issues and problems that had arisen from the litigation and the settlement negotiations. They sought our guidance in addressing these issues and resolving the problems. Because of my representative capacity, I conveyhyed information received at the Steering Committee meetings to other provisional sergeants as described above and obtained their views on how the issues should be resolveeed. Based upon these contacts

and similar contacts by other members of the Committee, the Steering Committee gave specific directions to counsel concerning the choices to be made and the directins to be taken in reaching an equitable settlement as quickly as possible. From the informatin I obtained at the meetings and from myreview of th settlement itself, I am convicned that counsel vigorously and competently represented the interests of the provisional Sergeants in this litigation.

9. Many of the provisonal Sergeans with whom I have spoken and I have philosophical problems with promotons based on quotas. However, we are all well aware of the circumstances that now exist and the clear consensus expressed to me has been that, given the results surrounding this particular examination, the settlement is the only equitable way to resolve the case between the

litigants. Based upon my experience as a member of the Steering Committee, I am very familiar with the terms of the settlement and with the circumstances currently existig in the operation of the NYCPD as they affect me and other provisional Sergeants. I believe that the settlement is fair and equitable under the circumstances, and, to a person, every provisional Sergeant whom I have contacted feels that the approval of the settlement would be in the best interest of the class of provisional Sergeants as a whole.

10. This affidavit is submitted in support of final approval of the settlement provisionally approved by the Court in the above styled cases and the facts stated herein are true and accurate to the nbest of my information, knowledge and belief. [Dated 15 April 1986 endorsement omitted].

Costello Responding Police Officers Written Submission in Hispanic Objection Hearing. USDC SDNY [caption omitted].

Submission and Argument on behalf of
U.S. Dist. Court, So. Dist. N.Y.

Responding Police Officers, the list of their names being appended hereto, as New York City Police Officers who have a grade as high as or higher than the grade of persons heretofore promoted to the rank of Sergeant, NYCPD, by reason of the same competitive examination, which Responding Police Officers have not been certified by respondents as having passed the examination. Said Responding Police Officers contend that the stipulation should be modified by directing that such Responding Police Officers with equivalent or higher grades than those previously promoted be considered to have passed the examination by reason of **Equal Protection of the Laws.** Responding Police Officers request leave to present Oral Argument at the hearing now scheduled for April 17, 1986.

Responding Police Officers as and for a response herein respecting the proposed settlements allege:

1. The Responding Police Officers submit the within comments respecting the proposed settlement on the basis that they are Police Officers who have marks equivalent to or higher than beneficiaries of the settlement who have heretofore been promoted while the Responding Police Officers have been denied **Equal Protection of the Laws**, as part of an established municipal procedure. To the extent that the **New York Constitution, Art. V, Sec. 6** provides that appointments and promotions in the civil service be made according to merit and fitness to be ascertained by competitive examination, and such be viewed as a contractual obligation of the state setting forth a legitimate, long

standing and governmentally encouraged expectation of advancement into supervisory ranks, the proposed settlement is an impermissable **Impairment of the Obligations of Contracts** and violates the **United States Constitution.** The Responding Police Officers agree that the persons heretofore promoted by reason of the rerating triggered by this litigation have in fact passed the examination for sergeant. They contend that there is and was no justification to exclude the Responding Police Officers from the same rerating. The procedure was used as an exclusionary device in violation of **Equal Protection of the Laws**, rather than as a device to be used in consideration of the equally qualified group as one of, but not the only consideration upon which to promote. To the degree that the settlement orders

define defendants as all city employees, the Responding Police Officers have standing to seek modification of, object to or otherwise comment thereon.

3. To the degree that the Corporation Counsel of the City of New York purports to represent all defendants, the Responding Police Officers contend that that the Corporation Counsel has a position adverse to that of the Responding Police Officers. This conflict arises by reason of the refusal of said Corporation Counsel to insure that the legal rights of the Responding Police Officers to **Equal Protection of the Laws** be be advocated by him. Responding Police Officers competed in the same promotional examination as did the beneficiaries of the stipulation heretofore promoted, and hence are qualified to be considered for

promotion as well. Moreover the negotiations of the parties were done with the explicit intent to secretly and unreasonably arrive at a conclusion without consultation with or approval of the Responding Police Officers whom the settlement defines as being clients of or being represented by the Corporation Couunsel.

4. To the extent that they are being deprived of **Equal Protection of the Laws** as hereinafter alleged, the Responding Police Officers contend that they do not consent to such result and urge a modification to comply with constitutional requirements. **The United States Constitution is the Supreme Law of the Land,** and any requested Court order, even those under Title VII, must not violate the mandate respecting **Equal Protection of the Laws.** Nothing herein

is to be construed to be in lieu of or by way of diminution of the case of **Marino et al v Ortiz, et al,** 85 Civ 10068 (RLC), currently before this Court. The comments herein are made lest failure to timely to do so be perceived as consent to the content or impact of the settlement.

5. At all times hereinafter mentioned the Responding Police Officers were and still are members of the New York City Police Department having attained said position by virtue of competitive examination. Said rank being the entry level civil service position.

6. At all times hereinafter mentioned the defendant JUAN U. ORTIZ and his successor JUDITH LEVITT held the position of Personnel Director of The City of New York, and the Defendant BENJAMIN WARD was and still is Police

Officers Commissioner of the City of New York.

7. The rank of Sergeant, New York City Police Department is a civil service supervisory position of next higher rank than that of Police Officers Officer, and appointment thereto is required by state law to be made by virtue of Police Officers taking and passing a competitive examination. There are two higher ranks which are civil service and competitive, those being Lieutenant and Captain respectively, and one must first attain the rank of Sergeant in order to compete for the rank of lieutenant.

8. At all times hereinafter mentioned the defendant ORTIZ had the authority, through his agents and employees, to prepare, promulgate, administer, grade, and certify results of competitive examinations for promotion

to appointing authorities, including that for the position of Sergeant, New York City Police Department. At all relevant times hereinafter mentioned the defendant WARD was and still is the appointing authority to the position of Police Sergeant.

9. That the requirements of the New York State Constitution Article 5, Section 6 provides in relevant part that appointments and promotions in the civil service of the state and all of the civil divisions thereof shall be made according to merit and fitness to be ascertained, as far as practicable, by examination, which, as far as practicable shall be competitive. The City of New York is a municipal corporation and a civil division of the state of New York.

10. Heretofore the defendant ORTIZ did cause an examination for Sergeant,

New York City Police Department be be prepared, administered and graded, and, based upon the results thereof certain persons were determined to have passed the said examination and have by reason thereof been promoted to sergeant. Said examination was administered to various Police Officers including the Responding Police Officers in June, 1983.

11. That in developing the said examination defendant ORTIZ sought and did obtain outside assistance from a firm of experts specializing in test preparation to insure that the test was fair. The Office of the New York City Corporation Counsel of which JUDITH LEVITT was a member with specific duties thereto did review the examination to insure that the said examination complied with legal requirements

12. The examination consisted of two

parts--technical knowledge and job sample (video viewing) questions--which were to be answered by selecting one of four possible choices as the correct answer thereto.

13. Originally it had been determined that 30 wrong answers on the Techincal Knowledge portion and 10 wrong on the video portion were to be passing grades defining qualified persons to be promoted to the rank of Sergeant, New York City Police Department. After the test, the defendants did cause the mark to be raised to 22 wrong on technical knowledge and seven wrong on video. This was done to create a smaller list and did thereby exclude the Responding Police Officers and others with equivalent grades from the list of passing candidates. The result of the action was to artificially create an alleged racial disproportionate

impact, triggering this subject lawsuit. Had the mark remained as originally set, such artificially created impact would not have occurred, and all persons who benefitted by the stipulation herein as well as the Responding Police Officers would have had a passing grade without the need for judicial intervention, and on their own competitive merits.

14. The position of sergeant is a supervisory one wherein Police Officers are those of lower rank who are the supervised. It is also a position opportunity of long standing expectation in advancement into supervisory ranks, as there is a minimum service requirement which must be met as a prerequisite thereto. All Responding Police Officers met such prerequisite.

15. The defendants have made promotions to the position of sergeant of

persons all of whom have passed the examination, some of whom have grades equal to or lower than the grades attained by various Responding Police Officers who competed with them on the same examination. The Responding Police Officers have not been designated by the defendant ORTIZ nor by his successor JUDITH LEVITT as having passed the said examination.

16. **The 14th Amendment to the United States Constitution** mandates that all persons within a state be accorded **Equal protection of the Laws.**

17. A candidate who has a grade equal to or higher than one who has passed the examination has also passed that examination.

18. If racial considerations can arguably be employed as a consideration in determining the time that a candidate

can be promoted, it can not be **the only consideration** to the exclusion of equally qualified person against whom they competed. The proposed settlement can only pass constitutional muster if all Responding Police Officers with equivalent or higher grades than those previously promoted be certified for promotional consideration as having demonstrated their merit and fitness as a result of competitive examination.

19. The refusal of the defendants to deem all Responding Police Officers with grades equivalent to or higher than the grades of those who passed that examination as also having passed it is a denial of **Equal Protection of the Laws** as well as the requirement that promotions be based upon merit and fitness to be determined by competitive examination Moreover, to the degree that

the **New York State Constitution** requires promotions to be made upon a showing of merit and fitness after competitive examination, and to the extent that this requirement be viewed as contractual in nature between the municipality and its employees, the proposed settlement would be an impermissable violation of the **Impairment of Contracts** by the state municipality which is proscribed by the **United States Constitution.**

20. Such Responding Police Officers as have a grade equal to or higher than one heretofore promoted to sergeant by virtue of the same competitive test have passed the examination and have earned the right to have their merit and fitness evaluated by the appointing authority for the same position. They have been unlawfully deprived of the opportunity to be

evaluated on their said merit and fitness by reason of the determination of the defendants ORTIZ and LEVITT not to assign a passing grade to them. Said determination was and is arbitrary, capricious, unreasonable and unlawful, and does trammel the constitutional rights of the Responding Police Officers, and said determination has been participated in by the defendant WARD or his agents and employees.

21. That the examination as developed and administered by the outside experts and the defendants was done so by acceptable standards fully compliant with requirements to avoid unfairness.

22. That in November, 1985, the defendants made certain promotions to the rank of sergeant by reason of rerating of the said examination. The rerating was justified because certain questions

threin were discovered to be not job-related. Said questions, upon information and belief, were both in the technical knowledge and job sample portions of the examination. Defendants did determine that the pass marks should be adjusted to remedy this objectively ascertainable fact.

23. The adjusted pass mark was not equally accorded to all candidates who took the test, thereby depriving Responding Police Officers herein of **Equal Protection of the Laws.** The Responding Police Officers were excluded therefrom. Many of the persons who were promoted by reason of the adjustment had college credits and at least one had a masters degree and is believed to have been an instructor in the Police Academy. The fact that he and other such persons were members of a defined insular and

discrete minority did not mean that they originally failed the examination. They experienced the same non job related impact as did the Responding Police Officers with respect to the incompetence of the defendants in drafting and marking the examination in the first instance. The defendants deprived those Responding Police Officers who attained a mark equivalent to or higher than others promoted to sergeant of a legitimate, long standing and governmentally encouraged expectation of equal opportunity of advancement into supervisory ranks and to be evaluated on their merit and fitness as required by the competitive standard set for civil service competitive examinations.

24 By reason of the aforesaid, the Responding Police Officers are now of lower rank than persons promoted to

sergeant and are subject to being supervised by persons whom they outscored on the same competitive examination, and thereby have been deprived of **Equal Protection of the Laws,** by persons acting under color of state authority.

25. All persons within the state of New York should be treated fairly and equally. Were all persons with equivalant or higher marks than those already promoted considered to have passed the examination as required by **Equal Protection of the Laws,** no prejudice to the defendants would inure as there are currently over four hundred vacancies in the rank with hundreds accruing by retirement, promotion and attrition each year. Moreover all persons considered to have passed as a result of this examination have been promoted or passed over and no current

list yield from the subject examination exists, nor would anyone who competed in the examination be personally prejudiced or supplanted. Moreover the municipal respondents would save tens if not hundreds of thousands of dollars over the next three or four fiscal years by reason of not having to prepare, administer, grade, certify and defend a new examination, thereby benefitting the body politic at large, eradicating the deprivations of constitutional rights of these Responding Police Officers, strengthening the concept of competitive pomotional examinations and restoring confidence and morale throughout the membership in all ranks of the New York City Police Department.

25. At present there are hundreds of vacancies in the rank of Sergeant, New York City Police Department and no

subsequent examination has been given to fill them. Moreover several hundred vacancies accrue each fiscal year. **ALL RESPONDING POLICE OFFICERS ARE QUALIFIED TO BE CONSIDERED BY THE DEFENDANT WARD FOR PROMOTION TO SAID EXISTING AND NEXT SUCCEEDING VACANCIES, AS THEY HAVE A MARK EQUIVALENT TO OR HIGHER THAN PERSONS WITH WHOM THEY COMPETED FOR THE POSITION, AND FROM WHICH THE RESPONDING POLICE OFFICERS ARE BEING UNCONSTITUTIONALLY EXCLUDED..**

26. That heretofore defendants' highly qualified inside and outside experts determined that lower marks on the examination were appropriate, as set forth in a notice annexed hereto. However, by misjudging the needs of the service, as evidenced by the current hundreds of vacancies currently extant with no current list of eligibles, they raised the pass mark, yielding the latest

exhausted eligible 1 st. Had the mark stayed as originally set some of the Police Officers herein would have passed by reason of attaining that original pass grade.

27. Persons with the equvalent or higher grade on a competitive examination than persons already promoted as having passed it, prima facia are equally or more competent to fill the position of Sergeant, New York City Police Department than those said promotees and are justly entitled to be considered by the appointing authority for promotion to the rank, by reason of constitutionally protected Equal Protection of the Laws and also by reason of the needs of the service as evidenced by the hundreds of current and projected vacancies for which no current list of eligibles exist.

28. There currently exists a critical shortage of sergeants in the New York City Police Department and there is no

current list of eligibles to fill it.

29. No person would be displaced from entitlement to be considered for promotion to sergeant, nor be reduced from sergeant to police officer were the Police Officers herein accorded Equal Protection of the Laws respecting equavalent or higher marks attained by them on the examination which led to promotions of others with whom they competed.

30. Constitutional as well as fiscal responsibility will be demonstrated by the defendants if the Police Officers are oaccorded Equal Protection of the Laws as aforesaid, and many thousands of dollars of public funds would be saved if the existing hundreds of current and projected openings in the rank were filled by persons who have already demonstrated their merit and fitness to be conidered for promotion to the rank.

31 Annexed hereo are letters

heretofore served in Marino v Ortix, supra, which are reusted to be considered bythe court. The court is requested to consider any letters which might be submitted by the individual Responding Police Officers. These papers are submitted in addtion to requested oral argument at the hearing now scheduled for April 17, 1986.

WHEREFORE it is requested that the stipulated order be modified to direct that the defendants assign a passing grade to all Responding Police Officers who attained a grade equivalent to or higher than a candidate on the subject sergeant examination who has heretofore been or will be promoted to sergeant by reason ofhis litigation, to have passed the examination; directing the defendant WARD or his successors to utilize such designtion of persons as passing the examination in his considering for promotion to now current and the next

succeeding openings in the sergeant rank untill all said persons have been considered, irrespective of any limitatation of time in which an eligible list would normally run; staying the administering of any test for the said rank of serrgent, New York City Police Department, or certifying the results thereof until the defendants have fully complied with the requested directions; (4) that back pay, entitlements, promotional opportunities and seniority be accorded such persons who are promoted to segeant by reason hereof ass partial damages, and (5) reasonable attorney fees for the Responding Police Officers, with such other relief as may appear just and proper.

s/Ronald Podolsky Attorney for Police Officers. (Exhibits omitted) ***.

PETITIONER'S

BRIEF

(5)

FILED
JUL 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

86-1415

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

EVELYN MARINO, et al,
Petitioners

v.

JUAN U. ORTIZ, et al.,
Respondents

and

WAYNE COSTELLO, et al.,
Petitioners

v

THE NEW YORK CITY POLICE DEPARTMENT, et al.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONERS

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EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Is a civil rights action under 42 USC 1983 alleging violation of the Fourteenth Amendment equal protection of the laws clause, brought by persons with a grade equivalent to or higher than minority police officers who had theretofore been promoted to police sergeant pursuant to a Title VII interim order, which action was instituted before the notice of the Title VII objector hearing was published, and before the final order approving the settlement was issued, and both of which actions were before the same judge, in the same court, at the same time, with the same issues, an impermissible collateral attack on the Title VII proceeding which might lead to inconsistent results, thereby justifying dismissal of that 42 USC 1983 action?

2. Are persons with an equivalent or higher grade on a competitive civil service examination than the beneficiaries of a theretofore promoted group of minority canidates in a Title VII settlement and who nonetheless are excluded from promotional consideration, required to intervene in the Title VII action pursuant to FRCP Rule 24, or must they be joined by the parties pursuant to FRCP Rule 19?

PARTIES

The caption of the Petition for a Writ of Certiorari and the footnote listing on page 3 thereof names all paries to the proceedings in the United States District Court for the Southern District of New York, and the United States Court of Appeals for the Second Circuit.

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OPINIONS BELOW

Marino et al. v. Ortiz et al., 806 F.2d 1144 (2d Cir., Dec. 8, 1986) is reproduced at Pet. A1. It affirmed the dismissal by the United States District Court, Southern District of New York, Carter, USDJ, File No. 85 Civ. 60068 (RLC) n.o.r. reproduced at Pet. A57.

Hispanic Society of the New York City Police Department, Inc., et al. v The Police Department of the City of New York, et al., 806 F.2d 1147 (2d Cir. december 8, 1986) is reproduced at Pet. A58. It dismissed the appeal from the Order and opinion of the United States District Court, Southern District of New York, Carter, USDJ, File No. 84 Civ. 6628 (RLC, 40 Empl. Prac. Dec. (CCH) 36385 (SDNY) reproduced at Pet. A80.

JURISDICTION

In **Marino et al v Ortiz et al** the Court of Appeals for the Second Circuit by decision dated December 8, 1986, affirmed the dismissal of the complaint by the district court, as an impermissible collateral attack on the proposed settlement of the companion **Hispanic Society** case.

In **Hispanic Society of the New York City Police Department et al. v The Police Department of the City of New York, et al,** the Court of Appeals by decision dated December 8, 1986, dismissed the complaint of the Costello petitioners herein, on the grounds that they had no standing to appeal as objectors to a Title VII employment settlement, since they had never formally intervened in the case.

The petition for certiorari joined both companion cases under rule 19.4 of this Court. It was a petition for writ of certiorari to the 2d Circuit Court of Appeals relating to a civil matter and is filed within the time prescribed by Rule 20.2 of this Court. Jurisdiction pursuant to 28 U.S.C. 1254(1). The Petition was filed February 28, 1987.

Certiorari was granted May 18, 1987.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourteenth Amendment to the United States Constitution:

> No State Shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Article V, Sec. 6 of the New York

Constitution:

> Appointments and promotions in the civil service of the State and all civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable by examination which, as far as practicable, shall be competetive.

Federal Rules of Civil Procedure.

Rule 19(a) PERSONS TO BE JOINED IF FEASIBLE: A person who is subect to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double multiple or otherwise inconsistent obligatons by reason of his claimed interest. If he has

not been joined, the court shall order that he be made a party.

Rule 24(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in a action: (1) when a statute of the United States confers an unconditional right to intervene, or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the dispositon of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

United States District Court, Southern District of New York, Rules for the Division of Business Among District Judges.

Rule 15. Transfer of Related Cases. If it appars from the information and designation sheet or otherwise that a civil action or proceeding is related to a previously filed civil case still pending in this court, the newer case (high docket number)

shall be assigned to the same judge to whom the older case (low docket number) was assigned, and another case in the same category shall be assigned, by lot, to the transferor judge or judges.

Cases are related if they present common questions of law and fact, or arise from the same source or substantially similar transactions, happenings, events or relationships, or if for any other reason they would entail substantial duplication of labor if assigned to different judges.

If judges differ as to whether actions are related, the issue shall be decided by the assignment committee.

STATEMENT OF THE CASE

In the latter half of 1984, the Hispanic Society and the Guardians Association, two ethnic societies representing Hispanic and black police officers respectively instituted title VII suits in the district court for the southern district of New York against the New York City Police Department and the Department of Personnel and other city defendants, alleging that the sergeant's examination given earlier that year and the promotion eligible list based on the examination were racially discriminatory. The cases were assigned to Judge Carter. (Pet. A3-A4)

During the course of the cases which were consolidated, the Sergeants' Benevolent Association representing persons already provisionally promoted

from the list and the Sergeants' Eligible Association representing persons on the list who were not yet promoted as well as various white ethnic societies were granted leave to intervene to assert their respective interests. (Pet. A4). On November 27, 1985 the balance of the eligible list plus a certain number of black and Hispanic candidates previously perceived to have failed the examination were also promoted, pursuant to an interim order of the court permitting such promotions. (JA 45) After these promotions there still remained over 400 vacancies in the rank, the list was exhausted and no new examination had been given for the position (Pet. A86, A103).

On December 30, 1985 the Marino petitioners instituted a lawsuit pursuant to 42 USC 1983 alleging in their

complaint that they were police officers who had competed in the said sergeant promotion examination and had scored a grade equivalent to or higher than the scores of the minority members theretofore promoted and therefore they thereby were being deprived of equal protection of the laws guaranteed under the 14th amendment.(Pet. A14-A29). The suit was originally assigned to Judge Sweet, The attorney for the municipal defendants in both the **Hispanic** and **Marino** cases applied for transfer of the Marino case to Judge Carter, who was the judge handling the prior filed **Hispanic** case. (JA87). and it was transferred to Judge Carter under the assignment procedures of the Southern District of New York whereby related cases are assigned to one judge for all purposes.

On February 5, 1986 the municipal defendants in **Marino** filed a motion to dismiss the case alleging that it was an impermissible collateral attack on the agreement respecting the proposed **Hispanic** settlement. (Pet. A30-A38).

On February 7, 1986 the proposed settlement upon which the November 27, 1985 interim promotions been based was submitted to the district court and was agreed to by all parties except the intervening white ethnic societies.(Pet. A89) On that date while the **Marino** motion was pending before Judge Carter, he conditionally approved the proposed settlement, ordered that notice of the proposed settlement and objector hearing date of April 17, 1986 be sent to all plaintiffs, intervenors and posted in all precincts, and set a date within which

written objections were to be filed. (Pet. A89)

The Costello petitioners herein, who included all plaintiffs in the **Marino** litigation together with others similarly situated timely filed a joint written objections to the settlement by the same attorney who represented plaintiffs in **Marino.** The written objections were filed lest failure to do so would be perceived as tacit approval by the **Marino** plaintiffs of the settlement. (Ja 188).

On April 17, 1976 the objection hearing took place. No decision was yet had on the motion to dismiss **Marino.** The same attorney representing the Marino plaintiffs and the Costello objectors which encompassed them made known their equal protection arguments. They had not intervened in **Hispanic.** The definition

of "defendants" in the proposed settlement included all employees of the City of New York.(Pet. A64, A68-70, A100-A106).

On April 25, 1986, the motion dismissing the **Marino** complaint was granted by a memo endorsed on the motion papers citing Prate v Freedman, 430 F.Supp. 1373, 1374 (WDNY) aff'd mem, 573 F.2d 1294 (2d Cir 1977), cert denied, 436 US 922 (1978). (Pet. A57).

On June 16, 1986 Judge Carter approved the settlement and disallowed the objection of the Costello objectors.(Pet. A80, A98-A99). At this juncture the status of the two suits was that the **Marino** case had been dismissed as an impermissible collateral attack, and the Costello objectors, who included all Marino plaintiffs, who had not

formally moved to intevene in **Hispanic** were denied their request to modify the settlement to provide for their claims.

Timely appeals were made from each of the holdings to the Court of Appeals for the Second Circuit. The court affirmed **Marino** holding that it was an impermissible collateral attack on the **Hispanic** settlement. (Pet. A1, Pet. A11-A12). The appeal by the Costello objectors was dismissed on the grounds that they lacked standing to appeal since they had not formally intervened in **Hispanic.** (Pet. A77-A78). Both appeals were argued the same day and both were decided on December 8, 1986. The Petition to this Court was filed February 28, 1987 and was granted on May 18, 1987.

SUMMARY OF ARGUMENT

Petitioners and others competed in the same sergent examination. The municipal defendants anticipated a need over two years of 1000 sergeants. There was no predetermined "pass mark" defining minimum competency. The eligible list to be generated was to consist of those who scored within the highest 1000 plus ties. The list had 1040 candidates on it. By reason of discriminatory impact perceived by two minority groups of candidatees who scored below the first 1000, an action was commenced under Title VII of the Civil Rights act of 1964.

By reason of a proposed settlement of the Title VII action, minority candidates with a mark equivalent to or lower than the petitioners were promoted as was the remainder of the eligible

list. At that point the eligible list was exhausted, the minorities had been promoted and there were still hundreds of vacancies in the rank and no new test had been given. Petitioners were unnecessarily excluded from these remaining vacancies and the next accruing ones by reason of their race. The remedy employed was not narrowly tailored to prevent this unconstitutional result.

The Equal Protection of the Laws requirement in the circumstances of civil service promotions is clearly defined in **New York Constitution,** Art V, Sec. 6 as requiring promotions to be based on merit to be determined insofar as is practicable by competitive examination. Since the Petitioners attained a grade equivalent to or higher than the previously promoted beneficiaries of the

Title VII settlement, they were denied equal protection of the laws by the municipal defendants.

This assertion was made by service of the **Marino v Ortiz** complaint prior to the announcement of the objector hearing and six months before approval of the **Hispanic** settlement. It alleged denial of equal protection of the laws. The Costello Petitioners made similar arguments at the objector hearing. The dismissal of the **Marino** complaint as an impermissible collateral attack should be reversed as the suit was started well prior to the objector hearing and the final approval of the settlement by the district court, and hence was not an attack on an existing judgment or decree. Moreover the reassignment of the **Marino** case from Judge Sweet to Judge

Carter under the local rules governing assignment of related cases to the same judge worked a defacto consolidation, joinder or intervention, as the claims were fully and timely presented. There was no danger of undermining any judgment because none had yet been entered. The **Marino** suit was not an impermissible collateral attack and should not have been dismissed as such.

There are none of the perceived dangers of impermissible collateral attack in **Marino** as the litigants were still in place, judgment had not been entered nor the objector hearing even held at the time the suit was instituted. There was no danger that the same judge, hearing the two cases at the same time, with the same issues, before judgement, would reach an inconsistent result with

himself.

The court of appeals was in error in holding that the Costello Petitioners had no standing to appeal because they did not intervene in **Hispanic**. The concept of mandatory intervention is not embraced in FRCP Rule 24. The litigating parties below, having written and oral notice of the claims of the petitioners **were** requred to follow the directions of FRPC Rule 19(a) respecting compulsory joinder of persons whose constitutional rights claims would be affected by the settlement. Even were there no intervention, objectors who claim violation of their personal rights can appeal from the consent decree.

Even if persons did not object, the district court did not adequately scrutenize the settlement and narrowly

tailor the remedy. The issues of equal protection of the laws, unnecessary exclusion of the petitioners from the surviving and next accruing vacancies under the circumstances made the remedy not precisely tailored. There was no consideration given to the assertions by all but the municipal defendants that the examination had non-job related questions which impacted on all candidates without regard to race. The district court did not consider the difference in entry level as opposed to promotional examinations respecting the quantity and quality of the racial remedy appropriate.

Irrespective of procedural considerations the courts below were required to make substantive determinations respecting petitioners' constitutional claims with a right to appeal therefrom.

ARGUMENT

POINT I: PETITIONERS WERE DENIED EQUAL PROTECTION OF THE LAWS AS THE RACIAL REMEDY EMPLOYED WAS NOT SUFFICIENTLY NARROWLY TAILORED TO PREVENT THEIR UNNECESSARY RACIAL EXCLUSION FROM THE RANK OF SERGEANT, THREBY REQUIRING THEIR COMPULSORY JOINDER UNDER FRCP 19(a)

Federal Rule of Civil Procedure, 19(a) specifically indicates that a person subject to service of process shall be joined as a party if he claims an interest relating to the subject of the action and is so situated that disposition of the action in his absence may leave any of the persons already parties subject to a substantial risk of incurring double multiple or otherwise inconsistent obligations by reason of his claimed interest. If he has not been joined, the court shall order that he be

made a party. Unlike FRCP 24 intervention which is permissive, the terms of FRCP 19(a) are clearly compulsory. If litigating parties expect a nonparty stranger to the suit to subordinate his constitutionally defined rights, and if they expect to be free from contemporaneous or future litigations respecting their settlement, it behoves such litigating parties to adhere to the clear requirements of compulsory joinder of those nonparties. See: **Local Number 98, International Association of Firefighter, AFL-CIO v** Cleveland, . US , 106 S.Ct. 3063 (1986)

The Petitioners had an interest relating to the subject of the action, and such interest was made known prior to and at the objector hearing. In the absence of joinder by the parties, the

court **sua sponte** was required to order the joinder. Petitioners, in opposition to motions to dismiss the appeal in the circuit court, asserted: [Petitioners' Reply Brief to Petition for Certiorari herein, at A4]

> 13. It would appear that since they are to forego their state constutional right and equal protection of the laws, they thereby became NECESSARY parties, and the failure to join them would render the settlement void. This is still an additional argument to deny both motions. If they are not defendants by reason of the clearr definition in the order, then they are Necessary Parties who, in order to be bound were required to be impleaded by the other parties seeking to effect the settlement.

The term NECESSARY was capatilized.

a. Threshold FRCP Rule 19 Interest.

On November 27, 1985, the entire eligible list generated by the subject sergeants' examination had been exhausted

and all minority beneficiaries of the agreement to settle the discrimination Title VII suit had been promoted as well pursuant to the interim order (JA.45). Moreover, hundreds of openings in the rank still existed with anywhere from 20 to 60 openings accruing each month. No new examination had been given and no list of eligibles was in existence. (Pet.A102-104). The objector hearing had not yet been scheduled.

The petitioners competed in the same examination and had a score equivalent to or higher than the promoted beneficiaries of the proposed settlement. **New York Constitution,** Art. V. Sec. 6 contains the precise definition of equal protection entitlement for civil service employees seeking promotion. The section directs that promotions to civil

service positions insofar as is practicable must be based on merit and fitness to be determined insofar as is practicable by competetive examination.

Were the minority beneficiaries of the agreement not qualified for the position or were the petitioners who outscored them in the examination not qualified, this case would not have to be decided on constitutional grounds, for no rationale exists, particularly in law enforcement for the appointment of unqualified supervisors. In this case the eligible list entitlement was set at the highest 1,000 scorers plus ties, generating a list of 1040. There are certain undisputed facts:

a) There was no pass mark as such defining the minimum level of competence to do the job, and Petitioners are

qualified for the position. The Municipal Respondents by Affidavit of Personnel Director Levitt at JA-148 asserted:

> "It is not true, as is suggested by the attorney for the intervenors Robert Hyman, et al., that we will have to promote people who "failed" the test in order to fill the quotas in this case. The original cutoff score did not define the minimum levels of knowledge and ability necessary for competent performance on the job. It was set solely by the number of sergeants the Police Department expected to promote from this list before the next list, from the next examination would be ready. The fact that candidates are being promoted who scored below the original cutoff does not mean that they are not qualified to do the job.

See; Stipulation Settlement. (JA 57-58).

Kenneth Kimerling on behalf of the Hispanic Society asserted at JA-132:

"24: The relief requested by these objectors, promoting all who scored the same as some of the minority officers who were promoted cannot be provided. The City does not doubt their qualifications, but there simply are not enough sergeant's positions to be filled for every qualified candidate***."

b) The Police Department vastly underestimated the expected vacancies, upon which estimate the eligible list entitlement was based. This pass mark was set at 1,000 as being the estimated needs of the department before a new exam could be given and a new list generated. Thus in the district court opinion is the observation of the court at Pet. A85 that:

> A shortage of Sergeants now exists on the police

force. At one time there were 1400 vacancies. while the provisional appointments have helped fill some of these vacancies, those officers in command of the police force are convinced that a larger number of provisional as opposed to permanent Sergeants creates great morale and administrative problems on the police force. Currently there is need for 2,825 police Sergeants. There are now 2,431 Sergeants on the force and of this number, 1,107 are provisional appointees.

c) The petitioners were city employees who were subject to service of process and whose joinder would not have ousted the district court of jurisdiction.

It is therefore shown that as of June, 1986, the date of the district court opinion, there were still approximately 400 vacancies in the rank

after the entire list and the minority beneficiaries of the agreement were promoted, with 20 or more vacancies accruing each month. Moreover no new examination has been given. No list of eligibles was in existence.

Exclusion of petitioners by reason of their race from promotion to the then existing and next accruing vacancies was and is entirely unnecessary giving rise to the threshold claim pursuant to which the parties to the litigation or the court were required to effect their compulsory Rule 19(a) joinder in order to comply with due process requirements. A nonparty stranger to a litigation is and should be a nonparty stranger unbound by its results

The petitioners who outscored the

beneficiaries of the settlement have been unnecessarily excluded from the rank because of the racial remedy employed in the settlement of the Title VII suit. This is so because the remedy employed was not narrowly tailored to avoid unnecessary tramelling of the personal constitutionally confered rights of the petitioners to be promoted by reason of their outcompeting others who have been promoted. There is no doubt that they have demonstrated their merit and fitness as have the previously promoted minority candidates.

Petitioners have consistently maintained that these minority members deserved the promotion as having passed the examination. Thus the Petitioners urged below that "Petitioners contend that previously promoted persons have

shown their merit and fitness, and contrary to the assertions of the defendants the [**Marino**] plaintiffs are not seeking to undo the promotions..." (Pet. A44) and "...Defendants are engaging in racially insulting behavior if they seek to imply that those previously promoted candidates did not in fact demonstrate their merit and their fitness for the position for which they competed..." (Pet. A47-48) and further, at the objector hearing in **Hispanic** counsel for the Petitioners herein specifically stated, "...It is our position that the beneficiaries of the stipulation have in fact passed the examination and did in fact deserve to be certified to the police commissioner as having done so..." (Pet. A102).

The contentions of the Petitioners

is founded on equal protection of the laws as guaranteed by **United States Constitution,** Fourteenth Amendment. Equal protection under these circumstances is clearly defined by **New York Constitution,** Art. V. Sec. 6.

That petitioners have the requisite Rule 19(a) claim of an interest relating to the subject of the action and are so situated that disposition of the action in their absence as parties leaves some of the parties subject to a substantial risk of incurring multiple or inconsistent obligations by reason of their claimed interest is clear. Rule 19(a) joinder is clearly compulsatory. especially as here those claims were made known in writing and orally to the parties and the court.

The state action that was complained

of below was based upon an agreement to settle the dispute between the municipal respondent and the **Hispanic** and **Guardian** litigants. The petitioners herein did not agree to the settlement. The issue is whether the original parties to the litigation can agree to the subordiation of the petitioners' personal constitutional rights without their compulsory joinder.

b. The official - personal capacity.

The 2d Circuit described the Costello Petitioners as mere objectors at the objection hearing who were nonparties and hence had no standing to appeal. The the definition of "defendants" contained in the settlement agreement, is set forth in the **hispanic** opinion at Pet. A68 as follows:

The "New York City Defendants" shall mean and refer to the City of New York, the New York City Police Department, the New York City Department of Personnel, and all officers, employees or agents whether elected or appointed of the City of New York, but not including the Hispanic Society plaintiffs, the Guardians Association plaintiffs, the intervenor defendants or any individuals or groups represented by the Hispanic Society plaintiffs, and the Guardians Association plaintiffs or the intervening defendants.

The Costelo Petitioners had claimed standing because they were city employes who took the subject examination, who outscored the theretofore promoted beneficiaries of the settlement and hence were not remote to the litigation. They contended that the stipulation should be modified as

> "there is and was no justification to exclude the Responding Police officers from the same rerating. The procedure was used as an exclusionary device in violation of **Equal Protection**

> **of the Laws** rather than as a device to use in consideration of the equally qualified group as one of, but not the only consideration upon which to promote. To the degree that the settlement orders define defendants as all city employees the Responding Police officers have standing to seek modification of, object to or otherwise comment thereon." (JA 185-16)

The submission then observed that the corporation counsel representing the city defendants had a position adverse to that of the Responding Police Officers; that the conflict arose by reason of the refusal of said counsel to insure that the legal rights of the Responding Police Officers to equal protection of the laws be advocated by him; that the responding police officers had not been consulted by the corporation counsel, and that the Costello Petitioners did not consent to the agreement to the extent that it so deprives them of equal protection of the laws. They requested that their

submission in **Hispanic** not be construed to be in lieu of or by way of diminution of the case of **Marino et al v Ortiz, et al**, "currently before this court" and that the submission was filed "lest failure to timely do so be perceived as consent to the content or impact of the settlement." (JA 186-188).

The court of appeals in dismissing the Costello **Hispanic** appeal stated that as the Costello petitioners did not intervene they were not parties and hence had no standing. The opinion observed that the the Costello petitioners' argument that the settlement agreement made them parties in their individual capacities, as opposed to their official capacity was without merit. (Pet. A74). The court held that the Costello Petitioners were nonparties in their individual capacity and had no standing to appeal.

If Costello Petitioners were nonparties then the effect of settlement could not require the subordination of their personally defined rights under **New York Constitution**, Art. V, Sec. 6. Even if they were nonparties, the district court was required **sua sponte** to modify or reject the settlement in order to prevent unnecessary trammeling of the Petitioners rights. See: concurring opinion of O'Connor, J. in **Local Number 98, International Association of Firefighters, AFL-CIO v City of Cleveland,** U.S. (July 2, 1986):

> ** Even if nonminority employees do not object to the consent decree, a court should not approve a consent decree that on its face provides for racialy preferential treatment that would clearly violate Sec. 703 or the Fourteenth Amendment ***.

Public officers are not required, as part of their position to render unto

the state their personally guaranteed constitutional rights. They have all the guaranteed rights of citizens. In **Gardner v Broderick**, 392 U.S. 273 (1968) this court held that police officer, even in the face of charges of corruption, is still entitled to due process of law and the right against self-incrimination. It was determined that Gardner in his official capacity was required to account to the police commissioner respecting his conduct for administrative discipline purposes. In his personal capacity, he could not be required to waive his constitutionally defined right against self-incrimination. The needs of the police department to investigate corruption charges was an important public need. It could not be paid for, however, with the debased currency minted from deprivation of personal

constitutional rights.

The district court at the Hispanic settlement having full knowledge of the claims of the petitioners was required to narrowly tailor the race conscious remedy and avoid the racial exclusion of the petitioners from the then current and next succeeding vacancies in the rank, particularly since the original list had been promoted as had the minority beneficiaries of the settlement.

Thus preferred in a time sense vis a vis their Costello petitioner collegues, the minority members would have a considerable "leg up" on the next lieutenants' examination as an additional remedy for perceived discrimination visited upon them. First, they would have seniority in the rank of sergeant, seniority being a component in the final overall score along with test results on

all of the police department promotional examinations. Next they would have more supervisory experience, attend more supervisor confrences than their delayed, but not racially excluded Costello collegues. Also, as an important advantage, they would have more time and incentive to study for the next lieutenants' test. This would help dissipate any future discrimination factor on this later examination. It would also tend to raise to the appropriate level the percentage of minorities who pass the lieutenant and captain exams in the first instance. Delay in a time sense was the more constitutionally comported approach. Racial exclusion of the Costello petitioners from the rank, particularly under the circumstances of this case was and is entirely unnecessary.

Neither court below considered the difference between entry level positions where the exclusion of qualified persons is diffuse and that of promotional positions where all candidates have committed their time and career path opportunities to a set of rules encompassed in constitutional and statutory mandate. Although exclusion under very strict circumstances might be called for in entry level positions it should never justified in promotional situations. At most, delay at the first line supervisor (herein sergeant) rank, could be tolerated, but only in extreme situations. At second line supervisor and above, the prior race conscious help that some but by no means all of the minorities may need should lead to the shifting of the "extraordinary burden of proof" borne by public employers to the

persons claiming the discrimination. The district court missed a rare opportunity to fashion the remedy to rectify the perceived discrimination and at the same time set the course for the future, which would have served as a guide to others who find themselves confronted with this difficult social torment. Only in this way can there be movement toward finity in the employment of race conscious remedy.

c. Considerations giving rise to the Rule 19(a) threshold claim.

This Court has discussed the constitutionality of racial clasifications adopted by governmental entities for the purpose of benefiting members of specified minority groups and has held that they must satisfy strict judicial scrutiny, must be narrowly tailored and must not unnecessarily

trammel the rights of others. **Fullilove v Kutznick,** 448 US 448, (1980); **Regents of the University of California v Bakke,** 438 US 265 (1978); **Wygant v Jackson Board of Education** US ,106 S.Ct. 1842 (1986); **Stotts v Memphis Fire Department,** 679 F.2d 541 (6th Cir. 1982) rev'd on other grounds sub nom Firefighters Local Union No. 1784 v Stotts, 467 US 561 (1984). This standard of strict scrutiny review was stated by Justice Powell in **Bakke** at 290-291, joined in by Justice White at 387 n.7. In **Pullilove** at 523 Justice Sewart, joined by Justice Rehnquist, declared that racial and ethnic classifications are "inherently suspect and presumptively invalid." Justice Powell agreed with this conclusion at 496-497 n.1.

Equal Protection of the laws is an individual right. **Shelly v Kramer,** 334 US 1, 22 (1948); **Sweatt v Painter,** 339 US 629 (1950; **Missouri ex rel Gains v Canada, 305 US 337 (1938).**

Simarily the right to competitive examination promotional opportunities conferred by **New York Constitution,** Art. V, Sec. 6 is a personal right of the candidate and a governmental obligation of the municipal employer. The distinction is between the status of the Petitioners in their official capacity and the personal rights conferred upon them by reason of their quest for competitive promotional opportunities.

This distinction was overlooked in the circuit court's opinion in **Hispanic** when it relied on **Bender v Williamsport Area School District,** U.S. , 106 S.Ct. 1326 (1986). Reliance on that case is misplaced, because there the school board member Youngman did not have a specifically constitutionally defined right or privilege which was being subordinated to the terms of the district

court judgment. He had been sued in his official capacity only. Unlike the Petitioners herein, he was not required to do or to lose anything personally. Moreover, the court of appeals in **Hispanic** at Pet. A-73 specifically observed that unlike school board member Youngman in **Bender** the Costello appellants therein were never parties in the district court in any capacity, and that they were defined in the settlement agreement, along with all other employees of the City of New York only in their official capacity to ensure that they would be officially bound. The court did not discuss the personal loss of their constitutional right to competitive promotional opportunities. The events at district court were not even the result of a trial. Title VII settlements are favored, but cannot

impose personal obligations on nonconsenting parties who have an important interest who have never been joined under Rule 19(a) FRCP.

It is also noted that the circuit court held that the Costello petitioners as objectors had no standing to appeal. Even objectors have a right to appeal when a nonparty has an interest that is affected by the trial court's judgment. **Martin Trigona v Shiff,** 702 F.2d at 385-86; United States v LTV Corp., 746 F.2d 51 (D.C. Cir. 1984). Here the Costello Petitioners had a constitutionally conferred right which was at stake. The personal constitutional right does not mean one thing to one group and another thing to another group. **Bakke,** per Powell, J,at 289-290. See also: Douglas, J, dissenting in **DeFunis v Odegard,** 416 US

312, at 337. Racial and ethnic classifications are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. **Hirabayashi v United States,** 320 US 81, 100 (1943). Any racial classification by a public employer is constitutionally suspect and must be subjected to the most careful and strict scruteny, with the gravest concern for the rights of those who may be called upon to bear the burden of that narrowly tailored remedy. There was insufficient scruteny in the district court and the remedy was not narrowly and precisely tailored to prevent deprivation of the rights of others.

This Court in **Local Number 98, International Association of Firefighters, AFL-CIO v City of Cleveland,** U.S. (July 2, 1986) in

discussing the issue of binding persons not parties to the litigation to a Title VII settlement observed:

> This is not to say that the parties may agree to take action that conflicts with or violates the statute upon which the complaint was based. As noted above, the fact that the parties have consented to the relief contained in a decree does not render their action immune from attack on the ground that it violates Sec. 703 of Title VII or the Fourteenth Amendment. ***A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of nonconsenting intervenors; if properly raised these claims remain and may be litigated by the intervenor [citing authorities]. And, of course, a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree.

There are ample decisions of the this court all of which characterize state laws and actions which discriminate on the basis of race or ethnic origin as constitutionally suspect

and subject to the most rigid scrutiny. **McLaughlin v Florida,** 379 US 184, 191-193 (1964); **Loving v Virginia,** 388 US 1, (1967); **Bolling v Sharpe,** 347 US 497 (1954). To pass constitutional muster a racial classification must be justified by a compelling governmental interest and must be necessary to the accomplishment of its legitimate purpose, and must be precisely tailored. **Dunn v Blumstein,** 405 US 330,343 (1972); **Kramer v Union Free School District,** 395 US 621, 627 (1969); **Shapiro v Thompson,** 394 US 618 (1969).

Equal Protection of the laws is an individual and personal right. **Shelly v Kramer,** 334 US 1,22 (1948); Sweatt v Painter, 339 US 629 (1950); **Missouri ex rel. Gains v Canada,** 305 US 337 (1938). The right applies equally to all persons without regard to any differences of race or color or nationality. **Yick Wo v**

Hopkins, 118 US 356,369 (1886); **Buchanan v Warley,** 245 US 60,76 (1917).

Petitioners contend that the posture of the case under consideration is such that they have shown the requisite threshold claim which reqired the parties to the litigation below to follow the mandate of compulsory joinder under Rule 19(a) FRCP. It is also hoped that this Court will decide on substantive grounds whether under the circumstances of this case, the race-conscious measures provided for in the consent decree at issue here were permisible under Sec. 703 and the Fourteenth Amendment.

The district court opinion also did not consider the distinction between entry level positions and promotional situations. In the former, the burden imposed upon equally qualified candidates is diffused among the population at large. In the latter instance, as with

layoffs, the burden is borne by persons with a reasonable expectation that if they outcompete their fellow employees in a promotional examination, they at the very least would be certified as having passed the examination if one with an equivalent or lower mark is deemed to be qualified. This distinction was made clear in **Wygant v Jackson Bd. of Ed.** US (May 19, 1986); **Firefighters v Stotts,** 467 US 561 (1984); see also: **Hammon v Barry,** 606 F.Supp. 1082, 1096-1099 (USDC Dist Columbia, 1985). In these existing employment situations any race-conscious remedy should be either avoided completely or so narrowly tailored as to inflict the least possible burden on others.

The opinion below makes no comment respecting the assertion in the **Hispanic** and **Guardian** complaints that questions on the examination were not job related

(A15,26) presumably an important element of the cause of action, along with disparate impact to sustain a viable claim. Nor does it comment upon or consider the affidavit of Personnel Director Levitt in support of the settlement which indicated that, "No questions on the exam have been found to be non-job-related, and no rerating has been done based on the exclusion of specific questions from the exam (except for two questions challenged before the final list was drawn up." (JA 155).

Counsel for the Costello petitioners asserted in the written request for modification and at the **Hispanic** objector hearing, as well as in the **Marino** complaint that many of the questions were not job-related, and impacted upon all candidates without regard to race. (JA 197-180, par. 22, Pet A104, Pet. A21, par. 180). The expert for the **Hispanic**

and **Guardian Society** litigants, Outtz in his sworn affidavit took issue with Personnel Director Levitt's affidavit, and specifically made the non-job related questions a critical element in his discussion of the examination. (JA 139-141). He also observed that the cutoff point for establishing the Eligible List was set arbitrarily and was not on the basis of inferences demonstrated to be accurate. Faced with the two sworn diametrically opposed affidavits, respecting a critical element of the matter, the district court and the court of appeals made no comment.[fn.]

Fn. On December 18, 1986 proceedings in New York Supreme Court ordered eleven changes in the alternate answers to questions on the Technical Knowledge component of the subject examination. The City has not appealed. As a result some candidates, including some of the petitioners and some of the very beneficiaries of the settlement in **Hispanic** previously perceived to have scored below the first 1000 candidates now were within the original eligibility perameter and hence were added to the list for promotion on their own initial examination performance. Impacting on whether the questions were job related, the court held:

> ***The court feels compelled to note its frustration with both the examination itself and the legal process for challenging the test results. Much of the examination seemed designed not to test knowledge, but to trick and deceive; many questions were ambiguous or subject to different interpretations, and indeed, had no clear cut correct answer. Perhaps the candidates should have been instructed to bring to the test their favorite luckey penny of Susan B. Anthony dollar, along with the ubiquitous No. 2 lead pencil -- since on numerous questions, a coin flip (mental or otherwise) was as good a method as any to choose an answer. ***
> **Prescott et al v Ortiz, et al.,** Index: 23662/84, Supreme Court New York County, **n.o.r.** (Blyn, J.).

All this convincing evidence of the merit of Petitioners' constitutional claims triggered a known requirement for the parties to the litigation and the court to institute compulsory joinder. Instead the court of appeals required mandatory intervention. FRCP Rule 24 is not mandatory in its terms. Mandatory intervention has been disapproved by this court. The law does not impose upon any person entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. **Chase Manhattan Bank v Norwalk,** 281 U.S. 431,441 (1934). A number of courts have ordered compulsory joinder of persons under rule 19(a) FRCP when the relief sought in the original action would conflict with their rights. See e.g. **English v Seaboard Coast Ry.,** 465 F.2d 43, 46-48 (5th Cir. 1972); **Bremer v St. Louis S.R.R.,** 310

F.Supp 1333,1339-49 (E.D. Mo. 1969). Supporting analogous situations have been addressed by this court. **W. R. Grace & Co. v Rubber Workers,** 461 U.S. 757, 771 (1983), citing **Alexander v Gardner-Denver Co,** 415 U.S. at 44. Just as an employer and the EEOC by a Title VII conciliation agreement cannot alter an existing collective bargaining agreement with a union without its consent, or be bound without a judicial determination in an action in which the parties joined the union, a public employer and some of its ethnic societies cannot alter the constitutional rights of the petitioners who outcompeted the beneficiaries of the settlement without compulsory joinder.

d. The presentation of Petitioners' claims below.

The court of appeals did not rule on the merits of **Marino** because it viewed the case as an impermissible collateral

attack on the then ongoing proceedings in **Hispanic** in the district court. The court of appeals dismissed the Costello Petitioners' appeal in **Hispanic** under the theory of mandatory intervention. These two holdings wrongly foreclosed substantive detrmination on the merits. The court of appeals did not properly consider three facts. First, the parties to the litigation were required to join the Costello Petitioners under Rule 19(a). Second, the substantive merits of the **Marino** plaintiffs and the Costello Petitioners were presented to the District Court before any final decree or judgment in the presence of the litigating parties who responded thereto. See: affidavits of Levitt, JA 154 and Kimerling JA 132. Third, the dispute of whether compulsory Rule 19(a) joinder by the parties to the litigation or mandatory intervention by the Petitioners

under the court intepretation of Rule 24 was required has been dissipated both by the second fact just discussed and by the procedural history of the **Marino** case.

Originally the **Marino** case was assigned to Judge Sweet. The municipal respondents herein made application to the district court to transfer the case to Judge Carter, who had been assigned the previously instituted **Hispanic**, (JN87) which had been consolidated with the **Guardian** case arising out of the same promotional examination. The basis of the application was founded on **United States District Court, Southern District of New York, Rules for the Division of Business among District Judges,** Rule 15 which states:

> Rule 15. Transfer of Related Cases. If it appears from the information and designation sheet or otherwise that a civil action or proceeding is related to a previously filed civil case still pending in this court, the

> newer case (high docket number) shall be assigned to the same judge to whom the older case (low docket number) was assigned, and another case in the same category shall be assigned, by lot, to the transferor judge or judges.
>
> Cases are related if they present common questions of law and fact, or or arise from the same source or substantially similar transactions, happenings, events or relationships, or if for any other reason they would entail substantial duplication of labor if assigned to different judges.***.

The fact that the case was thereafter timely assigned to Judge Carter for all purposes is conclusive evidence that there was a judicial determination that **Marino, Hispanic,** and **Guardian** were cases of common questions of law and fact, which arose from the same source, similar transactions, happenings,events or relationships. As a result, the transfer prevented any chance of inconsistent results (discussed in Point II infra), was not an impermissible

collateral attack on any final judgment.

Most importantly, it gave all the then litigating parties the due process opportunity to be heard and to defend against the claims of each other. In addition to these considerations, the court considered the arguments of all sides at the objector hearing and substantively ruled against the Costello petitioners' claims. The court observed:

> ***Some of the objectors allege that they too should benefit by the settlement and be protected since they scored as high as or higher than some minority members herein selected for promotion pursuant to the settlement. While such personal dissatisfaction with the agreement is understandable, there has been no showing of the test's disparate racial impact on any of the white applicants who object to not being placed on the eligible list.*** (A97).

It is from that decision and from the **Marino** dismissal that the appeals were taken. The distict court

erroneously limited any substantive claims of objection to a showing that the claimant was subject to racial disparate impact on the test. This Court in **Local 98 [Cleveland Firefighters]** cited twice above specifically verifies that the presentation of a valid Fourteenth Amendment claim of denial of due process or of denial of equal protection of the laws is an appropriately raised one. It should be ruled upon, preferably, as here, before judgment or approval, where all parties to the controversy can be heard and considered at the same time, before the same judge in the same forum. This is insurance against multiple litigation, collateral attack, duplication of effort and undermining of court decrees and judgments, which make unseasonal attacks impermissible under certain circumstances. Such is not the case here.

For the purpose of the discussion at hand, the application by the municipal respondents for transfer of **Marino** to Judge Carter under the local rules, could well be viewed as a **defacto** attempt on their part to comply with the requirment of compulsory joinder under Rule 19(a). The parties as well as the court considered the claims and were able to respond thereto. Thus the objective of joinder was accomplished. The petitioners were within the personal jurisdiction of the court, and jurisdiction is the key element to due process of law.

By reason of the foregoing discussion, Petitioners have demonstrated that they have a valid Rule 19(a) claim of constitutional proportion. It was presented during the ongoing litigation in the presence of the same judge and litigating parties at the same time and

in the same forum. The procedural objections to Petitioners' standing to pursue their judicial remedy are without merit. These meritless procedural objections do nothing more than foster a somewhat transparent denial of due process of law upon the already demonstrable denial of equal protection of the laws sought to be redressed herein.

POINT II: MARINO V ORTIZ WAS NOT AN IMPERMISSIBLE COLLATERAL ATTACK ON THE HISPANIC SOCIETY PROPOSED SETTLEMENT

As indicated in Point I, the persons who compete in the same competetitive examination and achieve a score thereon equivalent to or higher than persons against whom they competed have a claim of constitutional proportions if the lower scoring candidates are promoted to the exclusion of the higher scoring

candidates under the authority of **New York Constitution**, Art. V, Sec. 6. The **Marino** complaint alleged such a set of facts. It was not dismissed on substantive grounds, but rather on the grounds that the suit was an impermissible collateral attack on the **Hispanic** settlement, citing **Prate v Freedman**, 430 F.Supp. 1373, 1375 (W.D.N.Y.), affd mem 573 F2d 1294 (2d Cir 1977), cert denied, 436 U.S. 922 (1978). (JA 207).

The interim order which generated the promotions which exhausted the eligible list and promoted the minority candidates was dated November 27, 1985 (JA 46), the **Marino** complaint was served December 30, 1985 ; the Order directing an objector hearing for April 17, 1986 and notice of the terms of the **Hispanic** settlement was issued February 7, 1986; the motion to dismiss **Marino** was made February 9, 1986 (Pet. A 30, A38) the

Hispanic objector hearing was held April 17, 1986; the motion to dismiss **Marino** was granted on April 24, 1986 and the settlement in **Hispanic** was approved on June 16, 1986 (Pet. A99). The dismissal of the **Marino** complaint should be reversed as the suit was not an impermissible collateral attack on a final judgment or decree.

The Court of Appeals at the outset of its opinion recognized that it was called upon to determine what constitutes an impermissible collateral attack on a consent decree (Pet. A1). In holding the **Marino** litigation was an impermissible collateral attack, it observed that:

> Admittedly, Judge Carter had not given final approval to the consent decree in **Hispanic Society** at the time he dismissed the lawsuit, yet, the **Hispanic Society** litigation had proceeded to a very significant stage, a basic settlement had been reached and an interim order that matched the terms of the ultimate consent

decree had been filed. A hearing had been scheduled to determine whether the proposed settlement was reasonable, fair and adequate. Had appellants been allowed to maintain this lawsuit under these circumstances, the parties' incentive to pursue the **Hispanic Society** settlement would have been seriously eroded; the settlement would have had no utility if it failed to prevent further litigation of the matter. Furthermore, since even the later actual entry of the consent decree would not have decided the issue, the concept of final judgment would have been undermined. By the same token, this lawsuit would have relitigated the propriety of the settlement, thus inviting conflicting results. That appellants' complaint was before the same judge who was presiding in **Hispanic Society** does not change the result. See: **Black and White Children of the Pontiac School System v School Dist't,** 464 F.2d 1030 (6th Cir. 1972) (per curiam). There could be no certainty that the two proceeding would continue in parallel fashion. Thus judge Carter was correct in deeming this suit an impermissible collateral attack on a consent decree. Appellants proper of course, as in most cases where collateral attacks have been dismissed would have been to intervene in the lawsuit from which the consent decree issued ... (Pet. A10-A12)

This holding thus is founded on the idea that FRCP 24 is compulsory in its terms. As discussed in Point I, such view is in direct conflict with the clearly defined requirements of compulsory joinder spcifically set forth in FRCP 19(a). The Court's holding seeks to shift the burden from the parties to a litigation to a stranger to the suit.

The court of appeals in this case carried the concept of impermissible collateral attack far beyond the usual concerns upon which the doctrine is based. The policy of not permitting collateral attack is to insure the finality and reliability of judgments and final decrees which can be enforced. There may be some legitimate concern that final judgments and decrees not be undermined by attacks remote in time, place, issue, court judge or change in

circumstances. But that concern is not present here because the judgment or decree had not been entered and the objector hearing had not even been held when the two cases were before the same judge with all parties able to be heard.

For the policy prohibiting collateral attacks to have any viability, there must, of course, be a final judgment or a final decree, i.e. a final result requiring no further proceedings than than the appeal from or the enforcement of that final judgment or decree. Before judgment the parties have the capacity to pursue before the deciding court, as was done here, their respective interests as advocates, the opportunity to become aware of the adverse claims of others and take appropriate action and generally avoid the prejudice which might ensue by the

untimely anticipated claims of others after the final judgment of decree is entered.

It is only after judgment or the entry of a final order approving the settlement that the idea of impermissible collateral attack has any validity. This is not to say that nonparties may not pursue their claims, but there could come a time, place, circumstance or other event by reason of which prejudice could ensue. Hence the concern respecting post judgment collateral attacks and their permissibility. The concept protects litigants who have left the litigating forum with some assurance that the last act has resulted in a final enforceable judgment or final enforceable decree upon which the parties can rely. The concept, however, must comport with traditional constitutional requirements of due

process of law respecting the nonparties which the judgment affects.

The four decisions which have developed the concept of impermissible collateral attack leading to dismissal of the complaints are **O'Burn v Shapp,** 70 F.R.D. 549 (E.D. Pa. 1976, aff'd mem sub nom **Lutz v Shapp,** 546 F.2d 417 (3d Cir. 1976), cert denied 430 U.S. 968 (1977); **Thaggard v City of Jackson,** 687 F.2d 66 (5th Cir. 1982), cert denied sub nom. **Ashley v City of Jackson,** 464 U.S. 900 (1983) [commented on infra, p.]; **Prate v Freedman,** 30 F.Supp. 1373, 1375 (W.D.N.Y.), aff'd mem, 543 F.2d 1295 (2d Cir. 1977), cert denied, 436 U.S 922 (1973); and **Dennison v City of Los Angeles Dept of Water & Power, 658 F.2d 694 (9th Cir. 1981). Other courts have ruled to the contrary. United States v Jefferson County,** 720 F.2d 1511, 1518

(11th Cir. 1983); **Reeves v Wilkes,** 754 F.2d 965, 969-72 (11th Cir. 1985). Even the 5th Circuit expressed discomfiture with their prior policy in **Thaggard** in **Corley v Jackson Police Department,** 755 F.2d 1207 (5th Cir. 1985) when it observed at 1210:

> [If] well settled intervention rules in combination with the rule of **Thaggard v City of Jackson** to which we are firmly bound here, unjustly deny a party his day in court, then the appropriate remedy lies in reexamination of the appropriate forum, particularly in light of the opinion of Justice Rhenquist joined in by Justice Brennen dissenting from the denial of certiorari in **Thaggard*****.

Whether or not the concept of impermissible collateral attack should or should not be the policy to govern such suits, one common thread runs throughout all the major decisions, that being the recognition that in order to be an impermissible collateral attack it must

be an attack on a final judgment or a final decree. Before the final judgment or decree is entered, the judge and the parties can attend to the claims of others which are being asserted in whatever fashion without any prejudice attaching by reason thereof. The method by which the parties and the court exercise this attention is by the compulsory joinder of the nonparty under FRCP 19(a), as discussed in Poin I.

None of the perceived dangers of collateral attack such as remoteness of time, place, circumstance, court, judge or issue or inconsistent result were or are present in the case at hand. The judgment was not final. The both actions were in the same court, before the same judge. Under the **United States District Court for the Southern District of new York, Rules for the Division of Business**

among District Judges, Rule 15, the **Marino** case was transferred from Judge Sweet to Judge Carter who was assigned the earlier **Hispanic** and related **Guardian** cases This was because they were deemed to be related arising out of common questions of law, fact, transaction and circumstance. In effect, there was a defacto, if not a dejure consolidation of all three cases.

The 2d Circuit retreated from the bare minimum of a final judgment or decree requirement to impermissible collateral attack in this case, and held that it should apply to "almost judgments". The 2d Circuit indicated that, because the parties had progressed so far towards a settlement, to permit the collateral suit would have the result of seriously eroding the incentive to pursue the **Hispanic** remedy. The court

went on to say that the Costello Petitioners were required to intervene. The court however did not discuss how the mandatory intervention of the Petitioners would have any less of an eroding of incentive than would the collateral suit.

Added to this observation was a newly announced perceived danger to be attributed to a collateral attack, thereby making it impermissible: i.e. that the same district court judge, before judgment or consent decree is had, hearing and considering two cases, at the same time in the same court, with the same issues of law, fact, respecting how much scrutiny is to be applied to a proposed race-conscious remedy, relating to the same examination is in danger of reaching an inconsistent result with himself. Even were such a danger

possible, the contemporaneousness of such a state of affairs would lend itself to seasonal rectification by an appeal therefrom. Moreover the local rules directing that related cases be assigned to the same judge, which was employed in this case, is an inbuilt mechanism to foster consistent results. Obviously it was founded on the recognition that contemporaneous inconsistency respecting an identical issue by the same judge is a highly improbable event. It poses no predictable clear and present danger against which to be constantly vigilent The event is so remote that it lacks the vitality, urgency or stature sufficient justify the denial of a nonparty's constitutionally protected due process rights.

It is therefore clear that the Marino suit was not an impermissible

collateral attack on a final judgment or decree. The requisite danger of undermining a final judgment or final decree in order to render the collateral suit impermissible was not present. The assignment of the two cases to the same judge under the local assignment of related cases rules negated all perceived dangers which would render the suit an impermissible collateral attack.

CONCLUSION

THE MARINO COMPLAINT SHOULD BE REINSTATED. THE COSTELLO PETITIONERS HAD STANDING TO APPEAL IN HISPANIC. BOTH CASES SHOULD BE REVERSED AND SUBSTANTIVE RELIEF GRANTED.

Respectfully Submitted

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AMICUS CURIAE

BRIEF

MOTION FILED
JUL 1 1987

(6)

No. 86-1415

IN THE

Supreme Court of the United States

October Term, 1986

In re

EVELYN MARINO, *et al.*,

Petitioners,

v.

JUAN U. ORTIZ, *et al.*,

Respondents.

---

and

In re

WAYNE COSTELLO, *et al.*,

Petitioners,

v.

THE NEW YORK CITY POLICE DEPARTMENT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Motion for Leave to File a Brief and Brief on Behalf of Hon. Dov Hikind and The Citizens' Crusade Against Crime as *Amici Curiae* in Support of Petitioners

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Motion of Hon. Dov Hikind and the Citizens' Crusade Against Crime for Leave to File a Brief as Amici Curiae in Support of Petitioners

Interest of the Amici

Dov Hikind is a member of the New York State Assembly from the 48th Assembly District and Chairman of the Assembly's Sub-committee on Human Rights. Assemblyman Hikind is a strong advocate of an effective police force, and toward that end seeks to promote the employment and advancement of New York's policemen on the basis of merit examinations.

The Citizens' Crusade Against Crime is a not-for-profit association organized in 1972 by a group of New York citizens who had lost close relatives as the victims of violent crimes for the purpose of improving the criminal justice system and the quality of police performance in New York. It seeks to promote public awareness of problems it perceives in the administration of the criminal justice system. It was instrumental in financing a challenge to the consent decree in issue by a group of policemen who intervened in the Guardians' and Hispanic Society's litigation under the style of Robert Hyman, *et al.*, intervenors.

Assemblyman Hikind and the Citizens' Crusade believe it is against the best interests of an effective police force to reduce the qualifications required for promotion in order to equalize racial representation or for any other reason. They support petitioners' position because it represents a stopgap to the breach of merit promotions represented by the consent decree. If adopted, the view of the *Marino* petitioners would require the filling of additional vacancies in sergeants' ranks from among applicants who have

attained scores as high as or higher than those of the minority group members who have so far been promoted under the terms of the consent decree. The alternative appears to be promotions from among still lower minority scorers as more vacancies develop.

The Reason for the Motion

The point which the amici seek to advance by their brief is that the courts below prejudged the fairness of the proposed settlement as a basis for dismissing the *Marino* Petitioners' complaint. There is no other way the courts could have held that their complaint constituted an impermissible collateral attack on the settlement simply because it sought relief at odds with the settlement terms, when there had as yet been no fairness hearing and no adjudication of a consent decree on the proposed settlement. The Court of Appeals reasoned that the District Court was entitled to protect the settlement which the Respondents were promoting from possible disruption by the position advocated by Petitioners. In so doing it improperly deprived the *Marino* Petitioners of the right to a trial of their claims.

A review of the petition for certiorari reveals no argument of this point. Amici believe the courts' prejudgment of the issues is basic to Petitioners' case. Petitioners urge that the courts erred in viewing their complaint as a collateral attack. Insofar as that error was due to a prejudgment of a matter not yet heard, it affects the fairness of the entire proceeding.

Petitioner and Respondent City of New York and its Departments have consented but Respondents Guardians Association and Hispanic Society have refused to consent to the filing of this brief. Leave of the Court is therefore necessary in order for amici to present this point to the attention of the Court.

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No. 86-1415

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

In re

EVELYN MARINO, *et al.*,

Petitioners,

v.

JUAN U. ORTIZ, *et al.*,

Respondents.

and

In re

WAYNE COSTELLO, *et al.*,

Petitioners,

v.

THE NEW YORK CITY POLICE DEPARTMENT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief on Behalf of Hon. Dov Hikind and the Citizens' Crusade Against Crime as Amici Curiae in Support of Petitioners

The Opinions Below

The decision of the trial court in *Marino v. Ortiz*, SDNY docket no. 985, Civ. 60068 (RLC), 4 CCH Employ. Prac. Dec. ¶36,385, is not officially reported; it is reproduced at page A13 of Petitioners' Appendix to their petition for certiorari. The opinion of the Court of Appeals for the Second Circuit (No. 86-7347, Dec 8, 1986) is reported at 806 F2d 1144 and is reproduced at pp. A1-12* of the Appendix to the petition for certiorari.

Costello v. The New York City Police Dep't was an appeal from the unreported order of the District Court for the Southern District of New York (Carter, J.) in *Hispanic Soc'y v. The Police Department of the City of New York*, 84 Civ. 6628, which is reproduced at pp. A80-99 of the Appendix to the petition. The opinion of the Court of Appeals for the Second Circuit dismissing the *Costello* Petitioners' appeal (No. 86-7507, Dec 8, 1986) is reported at 806 F2d 1147 and is reproduced at pp. A58-79 of the Appendix to the petition.

Statement of the Case

Respondent Department of Personnel of the City of New York developed and administered a civil service examination for promotion of police officers to the rank of sergeant. It spent hundreds of thousands of dollars to make the test as job-related as possible (A17-18). It sought to fill over a thousand vacancies from those taking the exam, in rank order of their scores (A83).

More than eleven thousand police officers took the test. Significantly fewer blacks and Hispanic officers were in

*Numbers in parentheses preceded by "A" in this brief refer to pages of the Appendix to the petition for certiorari herein.

the rank of those scoring high enough for promotion, in proportion to the number of blacks and Hispanics who took the test (A60, A33). Respondents Guardians Association and Hispanic Society brought suit under Title VII of the Civil Rights Act of 1964, 42 USC §§ 2000e *et seq.*, on the basis of this Court's rulings that a significant discrepancy in test results between racial groups creates a prima facie case of discrimination for the government employer to rebut (A33-34).

There was no evidence of invidious discrimination or intent to discriminate, and Respondents Personnel Department and Police Department vigorously denied any intent to discriminate. However, the Corporation Counsel's office advised that it would be difficult to prove how the examination questions related to the job in question; and Respondent Police Department was in urgent need of more than a thousand sergeants and wished to fill the vacancies in its ranks as soon as possible (A4-5, A87).

In these circumstances a settlement agreement was worked out among Respondents New York City, its Police Department and Personnel Department, the Guardians Association and Hispanic Society on behalf of their black and Hispanic constituencies, and a group of intervenor-police officers who had received promotions, whereby additional black and Hispanic examinants from below the cutoff score would be promoted in rank order to make the number of blacks and Hispanics promoted proportional with the number who were tested (A5-6).

The proposed settlement plainly affected the rights not only of the parties to it, but of all other police officers who had taken the test, and of future police applicants. It proposed to favor employees on the basis of their race and ethnic background at the expense of employees of other races and ethnic backgrounds with higher test scores, on

the ground that such a solution was necessary to remedy the effects of discrimination. Such race-conscious relief is Constitutionally impermissible without a careful prior judicial hearing and determination that there is a racially discriminatory effect, that such relief is reasonably designed to overcome it and that it does not unfairly discriminate against others in the circumstances of the case (*Wygant v. Jackson Board of Educ.*, 476 US ____, 90 LEd 2d 260, 268-69).*

At the time Petitioners' action was brought no such hearing or determination had been made (A10). That the Police Department from *its* point of view considered settlement a more practical solution than litigating the merits did not establish the unfairness or insupportability of its exam. The Department was concerned with a prompt resolution to meet its needs (A5); the City administration to which the Department answered had public relations motives for a peaceful settlement wholly unrelated to the merits; and the settling intervenor officers wished to protect their own promotions. The merits of the action and the justification of the settlement remained in question.

None of the parties to the proposed settlement fairly represented the interests of the remaining police officers who were directly affected by it. Plainly no disposition of

*See *Palmore v. Sidoti*, 466 US 429:

> "A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race. * * * Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category. * * * Such classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of their legitimate purpose * * *."

their rights, as affected employees—and as citizens!—could have been imposed by a settlement which preferred employees for promotion by race and ethnicity without a prior judicial fairness hearing.

While the Guardians' and Hispanic Society's lawsuits were *sub judice,* before any hearing had been had on the fairness of the settlement and before any judgment or consent decree was entered on it, the *Marino* Petitioners brought their action claiming the same relief for themselves as the settlement proposed for Respondents Guardians' and Hispanic Society's constituencies (A7). Petitioners' complaint alleged that their test scores were equal to or better than those of Respondents' lower-score candidates for promotion (A20);* that since the time the test was administered hundreds of new vacancies for sergeants' positions had arisen in the Department (A25); and that Petitioners were entitled to be promoted to fill those vacancies on the basis of the scores which the Department now agreed were high enough to promote black and Hispanic candidates (A26-27).

The courts below dismissed Petitioners' complaint and prevented Petitioners from litigating its merits, based solely on their conclusion that it constituted an impermissible collateral attack on a consent decree, citing as authority dismissals of reverse discrimination complaints against the effects of race-conscious settlements in kindred cases (A13, A8-9).

*Moreover, Petitioners attained their scores on the basis of the *entire* test, consisting of a Technical Knowledge component weighted at 36% and a Job Sample component weighted at 64%. Under the terms of the settlement, the black and Hispanic candidates with scores equal to or lower than Petitioners' were promoted *solely on the basis of their scores on the Technical Knowledge component.* 64% of the test was not even considered in arriving at their scores (see Objections to Proposed Settlement on behalf of the Intervenor-Defendants (Mar. 28, 1986) p. 4, which is included in the record before this Court).

The District Court's decision consisted of one sentence (A13). The affirming opinion of the Second Circuit rationalized that the relief sought by Petitioners was at odds with the *in futuro* effect sought by Respondents for their proposed settlement; the possibility that Petitioners might win a favorable ruling on their claim could cause the Guardians and Hispanic Society to reconsider their decision to settle. Dismissal of Petitioners' suit was necessary in order to remove an impediment to the progress of Respondents' settlement (A37), since

> "Had appellants been allowed to maintain this lawsuit under these circumstances, the parties' incentive to pursue the *Hispanic Society* settlement would have been seriously eroded; the settlement would have had no utility if it failed to prevent further litigation of the matter" (A10-11).

Argument

Extraordinarily, it seems not to have occurred to the court below that it was prejudging the merits and fairness of Respondents' settlement. Its holding amounted to nothing less than that its perceived notion of the social value of a race-conscious settlement entitled the District Court to preclude Petitioners from having their own day in court on their claims, even though there was at the time no judgment in being to bar them from litigating their views. Its decision runs directly contrary to the Constitution's guaranty of the right to trial.

The right of a party to a fair trial of the issues he raises has been recognized by this Court as "the most fundamental of all freedoms" (*Estes v. Texas*, 381 US 532, 540). The decision of the courts below improperly deprived the *Marino* Petitioners of that right.

The courts' dismissal of Petitioners' complaint as a "collateral attack" was plainly improper. The doctrine of collateral attack is an extension of the doctrines of *res judicata* and collateral estoppel, which bar a party from litigating a claim or an issue of fact more than once. It prohibits the institution of a new litigation to challenge a judgment previously entered. *By definition it has no application except if a judgment or decree has already been entered:*

> "A collateral attack upon a judgment has been defined to mean any proceeding in which the integrity of a judgment is challenged * * *." (*Edward Thompson Co. v. Thomas*, 49 F2d 500 (DC App).)

Accord, *Trustees of Somerset Academy v. Picher*, 90 F2d 741, 744 (1st Cir), cert den 302 US 737; *A.D. Juilliard & Co. v. Johnson*, 166 FSupp 577, 586 (SDNY), aff'd 259 F2d 837 (2d Cir), cert den 359 US 942.

The citations by the courts below (A13, A8-9) to dismissals of other reverse discrimination suits on grounds of collateral attack are wholly irrelevant. Each of those cases* involved complaints first filed *after* a consent decree resolving a discrimination suit had been entered; they had nothing to do with two separate suits for relief on behalf of different groups going forward together.

The Court of Appeals was plainly aware of this nonsequitur. Its opinion acknowledged that "Admittedly, Judge

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**Prate v. Freedman*, 430 FSupp 1373 (WDNY), aff'd 573 F2d 1294 (2d Cir), cert den 436 US 922; *Dennison v. City of L.A. Dep't of Water & Power*, 658 F2d 694 (9th Cir); *Thaggard v. City of Jackson*, 687 F2d 66 (5th Cir), cert den 464 US 900; *Austin v. County of DeKalb, Dep't of Pub. Safety*, 572 FSupp 479 (ND Ga); *O'Burn v. Shapp*, 70 FRD 549 (ED Pa) aff'd 546 F2d 417 (3d Cir), cert den 430 US 968.*

Carter had not given final approval to the consent decree in *Hispanic Society* at the time he dismissed the lawsuit" (A10). It attempted to paper over this critical fact by observing that

> "Yet, the *Hispanic Society* litigation had proceeded to a very significant stage. A basic settlement had been reached and an interim order that matched the terms of the ultimate consent decree had been filed. *A hearing had been scheduled to determine whether the proposed settlement was reasonable, fair and adequate.*" (A10) (Emphasis added.)

The Court of Appeals' opinion in effect says that *scheduling* a fairness hearing is the same as *holding* one; that so long as one has been scheduled the court can treat it as a foregone conclusion that the settlement will be approved by the court and a consent decree entered as a matter of course. It holds that once a hearing has been scheduled, if a complaint urges a point of view at odds with the proposed settlement it is the same as though it were attacking a decree that the settlement is fair and proper.

Such a rationale is tantamount to a judicial pronouncement that the fairness hearing on Title VII consent decrees should realistically be viewed as on the same order of fairness and predictability as the extinct literacy test administered to black voters in some States in a bygone era—as nothing more than a pretense of examination devoid of substance.

To state the proposition should suffice to demonstrate its absolute impropriety. Yet that is the precise import of the Second Circuit's holding in this case. Such a holding, we submit, cannot be permitted to stand. It is directly con-

trary to this Court's pronouncement of the kind of searching inquiry that is required as a prerequisite to decreeing race-conscious relief:

> "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure it does not conflict with constitutional guarantees." (*Fullilove v. Klutznick*, 448 US 448, 491.)

No court has a mandate to prejudge the desirability of affording relief to one group of litigants as against another before a Constitutionally required hearing on fairness has been held, and on the strength of that prejudgment to dismiss the other's complaint in order to encourage the first group to go forward with a settlement. It is basic that "* * * all litigants, regardless of the merits of their case, are entitled to a fair trial" (*Habenicht v. RKO Theaters, Inc.*, 23 AD2d 378, 379, 260 NYS2d 890, 891 (1st Dep't)).

The action of the courts below contravened Petitioners' entitlement to an impartial court and a fair trial. It deprived Petitioners of their right to a trial of their claim in order to preserve the widest possible leeway for Respondents' settlement, based on the trial judge's pretrial view of the relative merits of the cases. This was improper.

> "No matter how strongly a Trial Judge may feel about the lack of merit of a case, there is no justification for denying a plaintiff a fair trial * * *." (*Habenicht v. RKO Theaters, Inc.*, 23 AD2d 378, 380, 260 NYS2d 890, 892 (1st Dep't).)

The decision below is an outgrowth of our courts' predilection for the favored social theory of the day. That theory holds that members of all races and ethnic groups

must of necessity be equally qualified to perform all tasks and pass all fair examinations; and if the scores of those members of a racial or ethnic group who take an examination fail to conform to this current wisdom, the examination must be skewed unfairly against the group or groups in question. No amount of experience can shake our courts from this "scientific" conviction.

Less than half a century ago the same courts were firmly convinced of the inequality of racial and ethnic groups, and upheld poll taxes, literacy tests and all kinds of invidious distinctions on the basis of their equally unshakable conviction that their views were a matter of "scientific" fact. The demonstrated folly of those bygone views should have cautioned our judiciary against insisting that their current moral views have the imprimatur of scientific fact.

The reality is that no one knows why examination results for different racial or ethnic groups differ substantially any more than anyone knows why *on-the-job performance* among racial and ethnic groups differs markedly in various fields. But it is undeniable that such marked variations in performance do exist, and that "They are *not* created by the tests" (see Schmidt & Hunter, "Employment Testing—Old Theories and New Research Findings," 36 American Psychologist 1128, 1131 (Oct 1981)).

Our courts' current insistence on imposing affirmative action quotas to accomplish the statistical equality among racial and ethnic groups in employment and promotional examinations exacerbates the social and juridical problems they seek to solve. Insisting upon the promotion of lower scorers from selected racial and ethnic groups does not provide the individuals so promoted with the skills they

lack; performance of the jobs to which they are promoted suffers and society suffers accordingly (see Hunter & Hunter, "Validity and Utility of Alternative Predictors of Job Performance," 96 Psychological Bulletin 72 (1984, No. 1)).

Wishful thinking about what an egalitarian society would like to believe cannot solve this obvious shortfall:

> "The research findings of the 1970s show that we can no longer entertain the belief that the problem is in the tests and that it can be solved by modifying or eliminating the tests. Instead, we must face the problem, which is that some groups of individuals are not acquiring the cognitive skills needed in a modern society to the same degree as others * * *." (Schmidt & Hunter, "Employment Testing—Old Theories and New Research Findings," 36 American Psychologist 1128, 1131 (Oct 1981).)*

A well-meaning but obstinate unwillingness to face the reality that statistical differences in performance are not the necessary product of discrimination and have not been eliminated by quotas has led to procustean solutions like that imposed in the instant case, in which passing scores

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*Contrary to the theory of test unfairness favored by courts, which holds that cognitive skill tests with disparate racial and ethnic results are not job-related, numerous studies have demonstrated that "Lower test scores among minorities are accompanied by lower job performance, exactly as in the case of the majority (Bartlett, et al., 1978; Campbell, Crooks, Mahoney, & Rock, 1973; Gael & Grant, 1972; Gael, Grant, & Ritchie, 1975a, 1975b; Grant & Bray, 1970; Jensen, 1980, chap. 10; Schmidt, Pearlman, & Hunter, 1980; Ruch, Note 8; Tenopyr, Note 9). This finding holds true whether ratings of job performance or objective job sample measures of performance are used. Tests predict job performance of a minority and the majority in the same way." (Schmidt & Hunter, "Employment Testing—Old Theories and New Research Findings," *op. cit. supra.*)

for "minority" applicants are shaped to meet the ability of the job applicants instead of to meet the needs of the job. The results are enormous economic loss and social injustice.

With whatever good intentions, equal ability cannot be legislated. To impose equality among *groups* by deriving *individuals* of the rights they have merited by their efforts and accomplishments is inequitable. It was that recognition which prompted Justice Douglas to write in *DeFunis v. Odegaard*, 416 US 312, 336:

> "There is no constitutional right for any race to be preferred * * *. There is no superior person by constitutional standards. A DeFunis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner."

The rush to imposed equality without regard to merit is the vice which prompted the dismissal of the *Marino* Petitioners' complaint below. The opinion of the Court of Appeals affirming the dismissal of the *Marino* Petitioners' complaint treated the need for a fairness hearing as a mere formality, whose outcome was as certain in advance as that of a theatrical drama. For that reason its decision cannot stand and the right of the *Marino* Petitioners to prosecute their claims must be reinstated. In order to make that right meaningful their complaint must be reinstated on the same basis and with the same possibilities as inhered at the time it was dismissed. A reversal must direct that the consent order that was subsequently entered on the Guardians' and Hispanic Society lawsuits cannot in any way bar or restrict the relief sought by those Petitioners.

Conclusion

The order of the Court of Appeals in *Marino* should be reversed, and the *Marino* complainants should be permitted to litigate their claims unaffected by the decree in the Guardians' and Hispanic Society's actions.

Respectfully submitted,

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BRIEF

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No. 86-1415

In the Supreme Court of the United States

OCTOBER TERM, 1987

EVELYN MARINO, ET AL., PETITIONERS

v.

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WAYNE COSTELLO, ET AL., PETITIONERS

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THE NEW YORK CITY POLICE DEPARTMENT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether individuals who have failed to intervene in an ongoing Title VII suit may be barred from challenging employment-related actions taken pursuant to consent orders entered in that litigation.

2. Whether individuals who have not moved to make themselves a formal party to an ongoing Title VII suit may appeal the entry of a consent decree in that litigation, certain terms of which the individuals find objectionable.

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INTEREST OF THE UNITED STATES

This case raises important questions concerning the rights and obligations of persons whose interests are affected by, but who are not party to, ongoing litigation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and by consent decrees entered therein. The United States has significant enforcement responsibilities under Title VII and is therefore often

involved in or affected by such Title VII suits and decrees. See 42 U.S.C. 2000e-5. Also numerous agencies of the United States engaged in federal court litigation concerning a range of subjects enter into or challenge consent decrees entered into by private parties and are vitally affected by rules of intervention and appealability. Accordingly, the United States has a substantial interest in the questions presented by this case.

STATEMENT

1. In June 1983 and April 1984, the New York City Police Department (NYCPD) administered a civil service examination to 11,899 police officers seeking promotion to the rank of sergeant (Pet. App. A60, A83-A86). Of these candidates for promotion, 79% were white, 12.3% were black, and 8.7% were Hispanic (*id.* at A60, A83). After scoring the examination, the NYCPD established a minimum point cut-off that left 1,041 officers eligible for promotion, 93.5% of whom were white, 2.3% of whom were black, and 4.2% of whom were Hispanic (*id.* at A60). The NYCPD proposed to fill numerous extant vacancies in the rank of sergeant from the 1,041 officers on this eligibility list (*id.* at A85-A86).

In late 1984, however, two groups representing black and Hispanic police officers on the NYCPD force—the Guardians Association of the Police Department of New York City and the Hispanic Society of the New York City Police Department—filed separate suits under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, to prevent the eligibility list from being used in the selection of officers for promotion (Pet. App. A3, A60-A61; J.A. 11-32). The plaintiff-groups alleged that the civil service examination, and thus the eligibility list it produced, had a disparate impact on black and Hispanic officers and were not job-related (Pet. App. A60-A61; J.A. 17-19, 28-30). The NYCPD, and other city officials named as defendants, promptly agreed not to use the eligibility list as a basis for permanent promotions,

pending the resolution of the litigation, but sought and received the court's approval to make provisional promotions of 534 officers from the eligibility list—506 of whom were white (94.8%), 7 of whom were black (1.37%), and 21 of whom were Hispanic (3.94%) (Pet. App. A84).

Three groups then successfully moved to intervene in both lawsuits (Pet. App. A4, A61-A62, A81)—the Sergeants Benevolent Association (SBA) on behalf of the officers who were provisionally promoted to the rank of sergeant from the eligibility list (*id.* at A4); the Sergeants Eligibles Association (SEA) on behalf of those officers who had not been provisionally promoted but who remained on the eligibility list (*ibid.*); and a group called the "Schneider intervenors" on behalf of certain white ethnic groups and other individuals who had not been promoted and who, although they had taken the civil service examination, were not on the eligibility list (*id.* at A4, A60-A62). These three groups joined with the plaintiff-groups and the defendants in attempting to negotiate a mutually acceptable settlement of the lawsuits (*id.* at A4-A5, A61-A62).

Ultimately, all parties except the Schneider intervenors agreed to the terms of such a settlement (Pet. App. A5; J.A. 52-85). That proposed settlement included the permanent promotion of all officers on the eligibility list as well as a sufficient number of black and Hispanic officers so that each group would be represented at the rank of sergeant in proportion to the number of those taking the civil service examination (Pet. App. A5; J.A. 70-75). The parties proposed to select these additional black and Hispanic officers on the basis of their scores on the written portion of the civil service examination (Pet. App. A63; J.A. 71-72, 74). Because the NYCPD continued to face problems associated with the shortage of sergeants on the force, the court, on November 27, 1985, gave interim approval to this proposal (Pet. App. A6, A84-A85; J.A. 46-48), thus allowing 573 more officers, approximately 160 of whom were not on the eligi-

bility list, to receive provisional promotions to the rank of sergeant (Pet. App. A6, A84-A85).

2. On December 30, 1985, the *Marino* petitioners, representing a class of white officers who were not on the eligibility list but who had examination scores at least as high as the lowest scoring minority officer receiving a provisional promotion under the interim settlement order, filed suit against various city officials (Pet. App. A7-A8). They alleged that the provisional promotions made pursuant to the interim settlement orders violated the Equal Protection Clause of the Fourteenth Amendment (*id.* at A26-A27), and prayed that members of their class be promoted to current and future sergeant vacancies as a remedy (*id.* at A28-A29).

The defendant-officials successfully moved that the *Marino* petitioners' case be reassigned to the judge who was handling the *Guardians Association* and *Hispanic Society* litigation (Pet. App. A8; J.A. 1, 87-91). Then, they moved that the *Marino* petitioners' complaint be dismissed as an impermissible collateral attack upon the interim settlement orders entered in the *Guardians Association* and *Hispanic Society* litigation (Pet. App. A30-A38). Before ruling on that motion, the court consolidated the *Guardians Association* and *Hispanic Society* cases and scheduled a fairness hearing concerning the terms of a final consent decree that the parties to that litigation (except for the Schneider intervenors) had submitted, on February 7, 1986 (Pet. App. A64, A89; J.A. 5-6). Notice of the proposed consent decree and hearing date was sent to all parties and posted in all precinct stations (Pet. App. A64; J.A. 49-51). In response, the Schneider intervenors and the *Costello* petitioners, a group of white officers who were not on the eligibility list but who had scores equal to or higher than similarly situated black and Hispanic officers who had been provisionally promoted,[1] notified the court, in writing and then orally at the April 17, 1986 fairness hearing, of their objections to the proposed decree (Pet. App. A64-A65, A89-A90; J.A. 183-206).

[1] The *Costello* petitioners include all of the plaintiffs in the *Marino* litigation (Pet. 15).

On April 25, 1986, the court granted the motion of the defendants in the *Marino* litigation to dismiss the complaint filed therein (J.A. 1). Finally, on June 16, 1986, the court approved the entry of the final consent decree in the *Guardians Association* and *Hispanic Society* litigation (Pet. App. A7, A65, A80-A99).

3. The *Marino* petitioners and the *Costello* petitioners filed timely notices of appeal (Pet. App. A2, A65-A66).[2] In separate decisions, however, the Second Circuit affirmed the district court's dismissal of the *Marino* petitioners' complaint (*id.* at A1-A12) and ruled that the *Costello* petitioners had no right to file an appeal (*id.* at A58-A79).

a. In affirming the dismissal of the *Marino* petitioners' complaint, the court relied on what it characterized as the "well-settled" rule "that collateral attacks on consent decrees entered in Title VII actions are not permitted" (Pet. App. A8, citing *Dennison* v. *City of Los Angeles Dep't of Water and Power*, 658 F.2d 694 (9th Cir. 1981), and *Prate* v. *Freedman*, 430 F. Supp. 1373 (W.D.N.Y.), aff'd mem., 573 F.2d 1294 (2d Cir. 1977), cert. denied, 436 U.S. 922 (1978)). It noted that "salutary policies" underlie this rule—namely, that "[a]llowing the terms of a consent decree to be contested in separate lawsuits would raise the specter of inconsistent or contradictory proceedings, would promote continued uncertainty thus undermining the concept of final judgment and would violate the policy of promoting settlement in Title VII actions" (Pet. App. A8-A9).

The court stated that, while the district court "had not given final approval to the consent decree in *Hispanic Society* at the time [it] dismissed the lawsuit," that litigation had "proceeded to a very significant stage"

[2] The Schneider intervenors also filed a notice of appeal, but subsequently withdrew it (Pet. App. A65-A66).

(Pet. App. A10). It then asserted that, "[h]ad [the *Marino* petitioners] been allowed to maintain this lawsuit under these circumstances, the parties' incentive to pursue the *Hispanic Society* settlement would have been seriously eroded" (*id.* at A10-A11); in its view, "the settlement would have had no utility i[f] it [had] failed to prevent further litigation of the matter" (*id.* at A11). The court added that, "since even the later actual entry of the consent decree in *Hispanic Society* would not have decided the issue, the concept of a final judgment would have been undermined" if the *Marino* litigation had been allowed to go forward and, "[b]y the same token," "would have • • • invit[ed] conflicting results" (*ibid.*). It therefore concluded that the district court "was correct in deeming this suit an impermissible collateral attack on a consent decree" (*id.* at A11-A12).

The court suggested that the *Marino* petitioners' "proper course, as in most cases where collateral attacks have been dismissed, would have been to intervene in the lawsuit from which the consent decree issued" (Pet. App. A12, citing *Dennison* v. *City of Los Angeles Dep't of Water and Power*, 658 F.2d at 696, and *Black and White Children* v. *School District*, 464 F.2d 1030 (6th Cir. 1972)). Indeed, the court noted that the defendants had suggested this course to the *Marino* petitioners (Pet. App. A12) and commented that, "[i]f intervention had been denied, the proper course would have been to appeal that denial" (*ibid.* (citation omitted)).

b. In dismissing the *Costello* petitioners' appeal, the court relied on the "general rule" that "only a party of record in a lawsuit has standing to appeal from a judgment of the district court" (Pet. App. A66, citing *United States ex rel. Louisiana* v. *Jack*, 244 U.S. 397, 402 (1917), *Martin-Trigona* v. *Shiff*, 702 F.2d 380, 385 (2d Cir. 1983), and *United States* v. *McFaddin Express, Inc.*, 310 F.2d 799, 801 (2d Cir. 1962)). Since the *Costello* petitioners "never moved to intervene in these proceedings, they [were] not parties to this litigation, and their appeal [had to] be dismissed" (Pet. App. A66).

The court recognized the existence of exceptions to this general rule and stated that "[t]he primary exception is when the nonparty has an interest that is affected by the trial court's judgment" (Pet. App. A67, citing *Martin-Trigona* v. *Shiff*, 702 F.2d at 385-386). But it found that the *Costello* petitioners "were not on the original eligible list, • • • have no right to promotion under state law[,] and • • • do not allege that the examination discriminated against them" and, therefore, "would not be entitle[d] to promotion" (Pet. App. A68). In such circumstances, the court concluded, the *Costello* petitioners have no right of appeal as nonparties with an interest in the order below (*ibid.*).

Finally, the court rejected various arguments that the *Costello* petitioners advanced concerning why they should be treated as de facto parties to the litigation (Pet. App. A68-A75). With regard to the *Costello* petitioners' claim that they are denominated as "defendants" under the definitional provisions of the consent decree,[3] the court noted that "the definitions in the settlement by their very terms delineate the parties to the agreement and not the parties to the litigation" (*id.* at A69); that, "[j]ust as the settlement cannot divest a plaintiff or defendant of party status in the litigation, it cannot confer party status on a nonparty" (*id.* at A70); and, in any event, that "[t]his provision of the settlement simply binds [the *Costello* petitioners] to comply with its terms in their official capacities as employees of the de-

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[3] The decree defines "New York City defendants" to include "the City of New York, the New York City Police Department, the New York City Department of Personnel, and all officers, employees or agents, whether elected or appointed, of the City of New York, but not including the Hispanic Society plaintiffs, the Guardians Association plaintiffs, the intervenor defendants or any individuals or groups represented by the Hispanic Society plaintiffs, the Guardians Association plaintiffs or [the] intervenor defendants" (J.A. 65-66). The *Costello* petitioners contended that, because they are police officers employed by the City of New York, they are included among the class of "New York City defendants" (Pet. App. A69).

fendants, and does not give them standing to raise their current objections to the settlement as violative of their individual rights" (*id.* at A70-A71). And, with regard to the *Costello* petitioners' claim that the "filing [of] written objections to the settlement and [their] appear-[ance] at the hearing gave them status as parties to the litigation" (*id.* at A74), the court noted that the *Costello* petitioners' "predicament results from their ste[a]dfast refusal to comply with the requirements for intervention set forth in Fed. R. Civ. P. 24" (*id.* at A75); that, "[b]ecause the requirements for intervention as a party have been ignored, the people pursuing this appeal have no more standing than individuals selected at random from a telephone book" (*id.* at A77); and, in any event, that it could not determine the decree's effect on the *Costello* petitioners' interests because "the record contains no affidavits or other sworn allegations describing their individual status as police officers or as candidates for sergeant" (*id.* at A77-A78).

SUMMARY OF ARGUMENT

I. The court below erred in dismissing the *Marino* petitioners' complaint as an impermissible attack on the final consent decree entered in the *Hispanic Society* and *Guardians Association* litigation. The *Marino* petitioners' complaint did not even challenge the final consent decree; it challenged the provisional promotions implemented pursuant to the interim settlement orders of the court. In any event, it is a fundamental principle of due process that a judgment may not be held binding on a litigant who was neither party nor privy to the litigation in which that judgment was entered.

While certain carefully-drawn exceptions to this rule against nonparty preclusion exist, none is applicable here. The parties in the *Hispanic Society* and *Guardians Association* litigation did not attempt to join the *Marino* petitioners, consolidate the *Marino* litigation with their lawsuit, demonstrate that the *Marino* petitioners were ade-

quately represented in their settlement discussions, or show that Title VII's remedial scheme expressly forecloses private litigants (like the *Marino* petitioners) from successively litigating issues that other litigants have raised in collateral Title VII litigation.

The "salutary policies" that concerned the court below can be and in the intention of Congress must be accommodated not by placing the burden of intervention on affected third parties but by other devices, particularly by requiring the litigants to join any party as to whom they may wish to argue preclusion at a later stage. Thus, the drafters of the Federal Rules of Civil Procedure determined that the concern for finality of judgments would be better served by mandatory joinder than by mandatory intervention procedures. Accordingly, in Rule 19, they placed the burden on the courts and the existing parties, not on the nonparties, to ensure that the risk of double, multiple, or otherwise inconsistent judgments is minimized. In addition, rules concerning transfer, consolidation, stare decisis, and comity are available to reduce the potential for inconsistent or contradictory proceedings. Finally, this Court has recognized that the policy favoring settlement of Title VII suits cannot be used to justify the abrogation of nonparties' legal rights. Allowing third-persons collaterally to attack consent decrees will not stop parties from entering into mutually advantageous settlements and, in any event, true voluntary compliance with Title VII requires either that all interested persons consent to any settlement agreement or that the agreement negotiated be able to withstand their third-party attack.

II. The court below correctly determined, however, that the *Costello* petitioners had no right to appeal the district court's entry of the final consent decree. This Court has long held that persons who are not formally parties to litigation have no right to appeal orders entered therein. The *Costello* petitioners clearly were not parties to the *Hispanic Society* and *Guardians Associa-*

tion litigation. They were not among the original contestants in the district court; they did not attempt to intervene; they were not substituted for another party; and they were not joined. Their participation was limited to filing written and oral objections to the proposed consent decree. Thus, like an *amicus curiae*, they were not parties, are not bound by the terms of the consent decree, and have no right to appeal.

To be sure, this Court has suggested on a few occasions that there may be exceptions to the rule against nonparty appeals and, accordingly, a few courts of appeals have admitted such exceptions. But Rule 3(a) of the Federal Rules of Appellate Procedure authorizes only parties to file notices of appeal. Moreover, as noted above, persons who are aggrieved by conduct resulting from a judgment to which they are not party may still protect their interests by filing a separate action (collaterally attacking that judgment) or by filing a post-judgment motion for intervention. We therefore submit that judicially crafted exceptions to the rule against nonparty appeals are both without authority and unnecessary.

Even if some exception to the rule against nonparty appeals exists, however, the *Costello* petitioners cannot qualify for it. The exception noted by the court below—to wit, that the nonparty must have an interest that is affected by the trial court's judgment—is not an exception at all, and must be rejected. The exception noted by several other courts of appeals—to wit, that the nonparties must have actively participated in the district court and the equities must favor allowing them to go forward—is inapplicable on the facts of this case. The *Costello* petitioners' involvement in the district court proceedings was minimal. They made no effort to intervene either before or after the decree was entered, and they submitted no affidavits or other sworn allegations concerning the extent to which the entry of the district court's judgment adversely affected their interests. They should not be allowed to proceed with an appeal.

ARGUMENT

I. INDIVIDUALS WHO FAILED TO INTERVENE IN AN ONGOING TITLE VII SUIT ARE NEVERTHELESS ENTITLED TO PURSUE AN ACTION CHALLENGING EMPLOYMENT-RELATED ACTIONS TAKEN PURSUANT TO CONSENT ORDERS ENTERED IN THE ORIGINAL SUIT

The court below dismissed the *Marino* petitioners' complaint as an impermissible "collateral attack" on the final consent decree entered in the *Hispanic Society* and *Guardians Association* litigation. But the *Marino* petitioners' complaint did not challenge that final consent decree and, for this reason alone, the judgment below is technically wrong. More importantly, however, the "collateral attack" doctrine on which the court below relied is at odds with the fundamental principle that a judicial decree is not binding on any person who was not party to the litigation in which that decree was entered. The "salutary policies" that the "collateral attack" doctrine promotes—to wit, the policies favoring finality of judgments, avoidance of inconsistent or contradictory judgments, and voluntary settlement of Title VII suits—can be satisfactorily accommodated by other procedural devices that are consistent with this fundamental principle of due process and with the congressionally approved rules of federal court administration. Accordingly, we agree with the Justices of this Court and the courts of appeals that have criticized or rejected the "collateral attack" doctrine.

A. As an initial matter, we question whether the court below correctly characterized this case as a collateral attack on the final consent decree entered in this litigation. The *Marino* petitioners filed their complaint approximately one month before the parties to the *Hispanic Society* and *Guardians Association* litigation even submitted their proposed consent decree to the court. The court did not approve or enter that decree until over six

months after the *Marino* petitioners' complaint was filed.[4] The *Marino* petitioners actually challenged the provisional promotions implemented by the defendants; their complaint does not mention or attack the final consent decree to which the court below referred. See Pet. App. A14-A29. Therefore, their complaint cannot logically be characterized as a "collateral attack" on the final consent decree entered in the *Hispanic Society* and *Guardians Association* litigation.

B. The complaint did challenge the provisional promotions undertaken pursuant to the interim orders and the question remains whether the *Marino* petitioners' challenge was properly dismissed as an impermissible collateral attack on those interim orders. We believe that it was improper for the courts below to do so and, indeed, it would have been improper even if the *Marino* petitioners had been challenging a final consent decree.

1. This Court has long stated that "[i]t is a violation of due process for a judgment to be [held] binding on a litigant who was not a party or a privy" to the litigation in which that judgment was entered (*Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 327 n.7 (1979)). See, *e.g.*, *Blonder-Tongue Laboratories, Inc.* v. *University Foundation*, 402 U.S. 313, 328-329 (1971); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969); *Hansberry* v. *Lee*, 311 U.S. 32, 40-42 (1940).[5]

[4] The *Marino* petitioners' filed their complaint on December 30, 1985. See Pet. App. A7. The parties to the *Hispanic Society* and *Guardians Association* litigation submitted their proposed consent decree to the court on February 7, 1986. See *id.* at A89. The court approved and entered that decree on June 16, 1986. See *id.* at A7.

[5] A fundamental corollary to this basic due process principle is that a judgment should be binding only on those persons who are subject to the jurisdiction of the court and who have sufficient notice of the litigation in which a judgment is entered. See *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice

As Chief Justice Rehnquist has noted, "[t]his rule can be traced to an opinion of Chief Justice Marshall in *Davis* v. *Wood*, 1 Wheat. 6, 8-9 (1816)," and "is part of our 'deep-rooted historic tradition that everyone should have his own day in court'" (*Ashley* v. *City of Jackson*, 464 U.S. 900, 902 (1983) (Rehnquist, J., joined by Brennan, J., dissenting from the denial of certiorari), quoting 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure*, § 4449, at 417 (1st ed. 1981)). This "deep-rooted historic tradition," which is embodied in both the Due Process Clause and the various rules that Congress had enacted to govern the administration of the federal courts, recognizes that just and accurate judicial decisionmaking is more likely to result when persons are allowed to present their own cases—at the time and place of their own choosing. See *Parklane Hosiery Co.* v. *Shore*, 439 U.S. at 327 n.7; *Blonder-Tongue Laboratories, Inc.* v. *University Foundation*, 402 U.S. at 328-329; see generally 15 C. Wright, A. Miller & E. Cooper, *supra*, § 3841, at 200-202 (1st ed. 1976); 18 C. Wright, A. Miller & E. Cooper, *supra*, § 4449, at 415-419; § 4452, at 446-453.

Of course, producing just and accurate judicial decisionmaking is not the only legitimate concern of our legal system. Finality, efficiency, and consistency of decision are also serious concerns. Accordingly, procedural devices exist for bringing nonparties into litigation and, in limited circumstances, for binding them to the results

reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"); *Consumers Union, Inc.* v. *Consumer Products Safety Comm'n*, 590 F.2d 1209, 1222 (D.C. Cir. 1978), rev'd on other grounds *sub nom. GTE Sylvania, Inc.* v. *Consumers Union, Inc.*, 445 U.S. 375 (1980). The rule against preclusion of nonparties advances this corollary proposition, since a court can rest assured that the parties are subject to its jurisdiction and have sufficient notice of the litigation. See Comment, *Collateral Attacks on Employment Discrimination Consent Decrees*, 53 U. Chi. L. Rev. 147, 154-165 (1986).

of litigation notwithstanding their absence. In appropriate circumstances and pursuant to proper procedures, a person may be joined in and thus become bound by litigation in which he would prefer not to participate. See *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 107-125 (1968); Fed. R. Civ. P. 19. Similarly, in appropriate circumstances and pursuant to proper procedures, "a district court may transfer any civil action to any other district or division where it might have been brought" (28 U.S.C. 1404(a)); and the receiving court may consolidate that action with any related litigation that is before it. See Fed. R. Civ. P. 42; see generally 15 C. Wright, A. Miller & E. Cooper, *supra*, § 3848, at 249-251, *id.* § 3481, at 200-202. Indeed, a person may be bound by litigation to which he is not a party where there are sufficient assurances that his interests are adequately represented therein by a certified class (see *Hansberry* v. *Lee*, 311 U.S. at 41-42; Fed. R. Civ. P. 23), where he has sufficient control over the conduct of one of the parties to that litigation (see *Montana* v. *United States*, 440 U.S. 147, 154-155 (1979); 18 C. Wright, A. Miller & E. Cooper, *supra*, § 4451, at 427), or where there is a special remedial scheme—as, for example, exists in bankruptcy, reorganization, and probate statutes—that expressly forecloses successive litigation by nonparticipants (see 18 C. Wright, A. Miller & E. Cooper, *supra*, § 4452, at 451, § 4458, at 520-521; see also *Chicago, R.I. & P. Ry.* v. *Schendel*, 270 U.S. 611, 618-620 (1926)). These various procedural devices, permitted by the Due Process Clause and the rules that govern administration of the federal courts, allow courts and parties, in appropriate cases, to achieve some finality, efficiency, and consistency in litigation without unacceptably undermining the accuracy of the judicial decisionmaking process or violating the due process rights of nonparticipants.

But none of these exceptions to the general rule against preclusion of nonparties applies in this case. Here, the *Marino* petitioners filed a lawsuit separate and apart

from the *Hispanic Society* and *Guardians Association* litigation. The parties in the latter litigation did not attempt to join the *Marino* petitioners as parties to their litigation or to have the *Marino* litigation formally consolidated with their lawsuits.[6] And there has been no showing, much less a defensible finding, that any party in the primary lawsuits adequately represented the *Marino* petitioners' interests, that the *Marino* petitioners had control over the conduct of any party in the *Hispanic Society* and *Guardians Association* litigation, or that Title VII's remedial scheme forecloses private litigants from successively litigating issues that other private litigants have raised in collateral Title VII litigation.[7] Thus, under

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[6] Pursuant to local rule, the defendants in the *Marino* litigation did move to have the action against them transferred to the same judge that was handling the *Hispanic Society* and *Guardians Association* litigation. But we are not aware of any motion by those defendants or by any other person to have the *Marino* litigation consolidated with the *Hispanic Society* and *Guardians Association* litigation.

[7] Of course, as the court below noted (Pet. App. A9), "Congress [has] expressed a strong preference for encouraging voluntary settlement of employment discrimination claims" (*Carson* v. *American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981)). But, as explained at pages 21-24, *infra*, allowing collateral attacks on Title VII consent decrees will not undermine this policy. In any event, neither the provisions which underlie this policy nor the policy itself expressly forecloses successive lawsuits by nonparticipants in Title VII litigation. This Court has apparently so held. See *Firefighters* v. *Cleveland*, No. 84-1999 (July 2, 1986), slip op. 26-27; *W.R. Grace & Co.* v. *Rubber Workers*, 461 U.S. 757, 770-772 (1983); *General Telephone Co.* v. *EEOC*, 446 U.S. 318, 332 (1980); see also *Firefighters* v. *Stotts*, 467 U.S. 561, 588 n.3 (1984) (O'Connor, J., concurring) ("if innocent employees are to be required to make any sacrifices in [a Title VII] consent decree, they must be represented and have had full participation rights in the negotiation process").

Title VII does authorize the Attorney General and the Equal Employment Opportunity Commission to initiate lawsuits on behalf of aggrieved individuals and, in such cases, gives the ag-

time-honored rules of due process and civil procedure, the *Marino* petitioners should have been allowed to proceed with their suit, as this Court's decisions acknowledge. See *Firefighters* v. *Cleveland*, No. 84-1999 (July 2, 1986), slip op. 26-27; *W.R. Grace & Co.* v. *Rubber Workers*, 461 U.S. 757, 770-772 (1983); see also *United States* v. *Mendoza-Lopez*, No. 85-2067 (May 26, 1987), slip op. 9-13.

2. In holding to the contrary, the court below followed a line of cases holding that collateral attacks on consent decrees entered in Title VII actions are not permissible. See *Thaggard* v. *City of Jackson*, 687 F.2d 66 (5th Cir. 1982), cert. denied, 464 U.S. 900 (1983); *Dennison* v. *City of Los Angeles Dep't of Water & Power*, 658 F.2d 694 (9th Cir. 1981); *Black & White Children* v. *School District*, 464 F.2d 1030 (6th Cir. 1972); *Austin* v. *County of DeKalb*, 572 F. Supp. 479 (N.D. Ga. 1983); *Prate* v. *Freedman*, 430 F. Supp. 1373 (W.D.N.Y.), aff'd, 573 F.2d 1294 (2d Cir. 1977), cert. denied, 436 U.S. 922 (1978); *Lutz* v. *Shapp*, 70 F.R.D. 549 (E.D. Pa.), aff'd, 546 F.2d 417 (3d Cir. 1976), cert. denied, 430 U.S. 968 (1977); see also *National Wildlife Federation* v. *Gorsuch*, 744 F.2d 963, 969 (3d Cir. 1984). Like the court below (see Pet. App. A8-A11), the courts in

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grieved individuals an absolute right of intervention. See 42 U.S.C. 2000e-5(f)(1). Some courts have therefore held that the statutory scheme precludes these aggrieved individuals from initiating successive litigation once the government's litigation has concluded. See, *e.g.*, *Adams* v. *Proctor & Gamble Mfg.*, 697 F.2d 582 (4th Cir. 1983) (en banc), cert. denied, 465 U.S. 1041 (1984); *Jones* v. *Bell Helicopter Co.*, 614 F.2d 1389 (5th Cir. 1980); *McClain* v. *Wagner Electric Corp.*, 550 F.2d 1115 (8th Cir. 1977). Whether these decisions are correct or not, they make clear that Title VII contains no provision authorizing a private litigant to initiate an action on behalf of another individual and thereby to preclude that other individual from bringing an action on his own behalf at the time and place of his own choosing (absent formal class certification procedures). Cf. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974) ("[t]here is no suggestion in the statutory scheme that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdiction").

those cases have expressed their concern that allowing collateral attacks on consent decrees entered in Title VII litigation will prevent the attainment of final judgments, raise the specter of inconsistent or contradictory proceedings, and undermine the policy of promoting settlement of Title VII actions. They therefore have concluded that persons with interests affected by ongoing Title VII litigation must intervene in those suits or face preclusion from the judgments entered therein. While the concerns motivating this conclusion are significant, they can and should be accommodated by the more finely-tuned procedural devices that Congress has approved for reconciling the tension between procedural fairness and judicial efficiency.

a. The concern that nonparties may wish to relitigate issues previously decided and thus prevent the attainment of final judgments is not a new one. The drafters of the Federal Rules of Civil Procedure expressly faced that concern when they were designing the rules that now govern the administration of the federal courts. The drafters recognized that rules of intervention have always been drawn in permissive terms and, therefore, that nonparties can refrain from intervention in litigation that affects them.[8] Rather than redraft the rules of inter-

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[8] See Fed. R. Civ. P. 24(a) (intervention as of right) ("[u]pon timely application anyone shall be permitted to intervene"); Fed. R. Civ. P. 24(b) (permissive intervention) ("[u]pon timely application anyone may be permitted to intervene"). See also *Chase Nat'l Bank* v. *City of Norwalk*, 291 U.S. 431, 441 (1934) ("The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. * * * Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights."); accord, *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 593 (1974); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969); *Gratiot County State Bank* v. *Johnson*, 249 U.S. 246, 249-250 (1919). But cf. *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 115 (1968) (suggesting in dicta that

vention in mandatory terms, however, they determined that the concern for finality of judgments would be "better [served] by mandatory joinder procedures" (18 C. Wright, A. Miller, & E. Cooper, *supra*, § 4453, at 453). Accordingly, they added Rule 19 to the Federal Rules of Civil Procedure. See Advisory Committee's Note to Fed. R. Civ. 19; see also Comment, *Collateral Attacks on Employment Discrimination Consent Decrees*, 53 U. Chi. L. Rev. 147, 164 (1986).

Rule 19 has two parts. Part (a) requires the existing parties and the court to join those persons whose presence is necessary and desirable for a just adjudication.[9] Part (b) requires the existing parties and the court to work out a fair and just solution when joinder is not possible—so that neither the absent person nor those already party to the litigation will be prejudiced by, for example, the issuance of a decree that impairs their rights or exposes them to double, multiple, or otherwise inconsistent obliga-

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a nonparty who "ha[s] purposely bypassed an adequate opportunity to intervene" might be barred from relitigating an issue).

[9] Rule 19(a) provides (emphasis added) that

> [a] person who is subject to service of process and whose joinder will not deprive the court of jurisdiction * * * *shall* be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) *he claims an interest relating to the subject of the action* and is so situated that the disposition of the action in his absence may (i) *as a practical matter impair or impede his ability to protect that interest* or (ii) *leave any of the persons already party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.* If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

tions.[10] Together, parts (a) and (b) of Rule 19 plainly place the responsibility (and means) for obtaining a final judgment with the courts and the existing parties, and *not* with the nonparties (such as the *Marino* petitioners), to the litigation. Accord, *Consumers Union, Inc.* v. *Consumer Products Safety Comm'n*, 590 F.2d 1209, 1223 (D.C. Cir. 1978), rev'd on other grounds *sub nom. GTE Sylvania, Inc.* v. *Consumers Union, Inc.*, 445 U.S. 375 (1980); *Adams* v. *Bell*, 711 F.2d 161, 194-198 (D.C. Cir. 1983) (Wright, J., dissenting), cert. denied, 465 U.S. 1021 (1984). The judicially developed "collateral attack" doctrine turns this allocation of responsibility on its head and is thus irreconcilable with the procedural scheme envisioned by the drafters of Rule 19 and the Congress that approved that rule's adoption.

b. Nor can the "collateral attack" doctrine be justified as a necessary means for avoiding the danger of inconsistent or contradictory proceedings. For one thing, the prevention of such inconsistent or contradictory proceedings is one of the principal purposes of Rule 19; application of the "collateral attack" doctrine would render Rule 19 a legislative redundancy. See Fed. R. Civ. P. 19(a) (joinder required where person's absence would "leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise in-

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[10] Rule 19(b) provides that

> [i]f a person * * * cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

consistent obligations"); see also McCord, *A Single Package for Multiparty Disputes*, 28 Stan. L. Rev. 707, 723-724 (1976). Moreover, transfer and consolidation procedures are available to prevent judicial proceedings from multiplying uncontrollably or undesirably and to enable a single judge to control litigation that is initiated by different parties in different places. See 28 U.S.C. 1404 (a); Fed. R. Civ. P. 42; 15 C. Wright, A. Miller & E. Cooper, *supra*, § 3841, at 200-202; *id.* § 3485, at 287. Indeed, even where joinder, transfer, and consolidation devices will not together ensure that only a single binding judgment can result concerning any particular matter, principles of stare decisis and comity will inform the second court that acquires jurisdiction over that matter and thus minimize the possibility of inconsistent or contradictory judgments. See *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976); *Kerotest Mfg.* v. *C-O-Two Fire Equip. Co.*, 342 U.S. 180, 181-182 (1952). And, in all events, the concern for correctness of judicial decisionmaking is as important as the concern for consistency among judgments and, accordingly, some inconsistent or contradictory judgments must be accepted.[11]

In attempting to eliminate (rather than to minimize) such inconsistent judgments, the "collateral attack" doctrine ignores our "clear experience with the general fallibility of litigation and with the specific distortions of judgment that arise from the very identity of the parties" (18 C. Wright, A. Miller, & E. Cooper, *supra*, § 4449, at 417). Ironically, that experience has been most evident

[11] Where such inconsistent or contradictory judgments arise, well-established procedures are available to ensure that the person subject to those judgments does not place himself in contempt of either court's judgment. The person may, of course, seek reversal of the second judgment on appeal. And, if unsuccessful on appeal, the person will have an appropriate ground upon which to seek relief from the court entering the first judgment. See Fed. R. Civ. P. 60; see also *United States* v. *Jefferson County*, 720 F.2d 1511, 1517-1519 (11th Cir. 1983).

in cases involving Title VII consent decrees, which themselves amount to "little more than a contract between the parties, formalized by the signature of a judge" (*Ashley* v. *City of Jackson*, 464 U.S. at 902 (Rehnquist, J., dissenting from denial of certiorari); accord, *Firefighters* v. *Cleveland*, slip op. 14-16, 19-21), and which involve strong incentives and opportunity to make innocent and unrepresented third-persons pay the price of sins that were not of their own making and from which they may not personally have benefited. Accord, *W.R. Grace & Co.* v. *Rubber Workers*, 461 U.S. 757, 767-770, 771-772 (1983); *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 239-240 (1982).[12] In short, the "collateral attack" doctrine pursues consistency in judicial decisionmaking with an unwarranted insensitivity to both the need for accurate judicial decisionmaking and the potential defenselessness of innocent and unrepresented third-persons.

c. This insensitivity cannot be justified by reference to the policy favoring voluntary settlement of Title VII disputes. To be sure, "Congress [has] expressed a strong preference for encouraging voluntary settlement of employment discrimination claims" (*Carson* v. *American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981)) and this Court accordingly has required that the resolution of interpretive questions concerning Title VII take account of the policy favoring voluntary settlement (see, *e.g.*, *Johnson* v. *Transportation Agency*, No. 85-1129 (Mar. 25, 1987), slip op. 12 & n.8; *Ford Motor Co.* v. *EEOC*, 458 U.S. at 229, *Carson* v. *American Brands, Inc.*, 450 U.S. at 88 n.14). But the Court has also explicitly recognized, in two cases that are dispositive here, that the policy favor-

[12] See also *Firefighters* v. *Stotts*, 467 U.S. 561, 589 n.4 (1984) (O'Connor, J., concurring); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 787-799 (1976) (Powell, J., concurring in part and dissenting in part); *Johnson* v. *Transportation Agency*, No. 85-1129 (Mar. 25, 1987), slip op. 19-21 (Scalia, J., dissenting); *Firefighters* v. *Cleveland*, slip op. 3-4 (White, J., dissenting); *Bushey* v. *New York State Civil Service Comm'n*, 469 U.S. 1117, 1120-1121 (1985) (Rehnquist, J., dissenting from denial of certiorari).

ing settlement of Title VII disputes is not absolute and cannot by used to justify the abrogation of nonparties' protected legal interests.

In *W.R. Grace & Co.* v. *Rubber Workers*, 461 U.S. 757 (1983), where an employer entered into a conciliation agreement with the EEOC that required it to disregard the seniority provisions of its extant collective bargaining agreement, the Court held that the policy favoring voluntary settlement of Title VII suits did not provide sufficient justification for overturning an arbitration award that required the employer to pay damages to employees who would not have been laid-off had the collective bargaining agreement's seniority provisions been followed. The Court noted that, "[a]lthough the ability to abrogate unilaterally the provisions of a collective-bargaining agreement might encourage an employer to conciliate with the [EEOC], the employer's added incentive to conciliate would be paid for with the union's contractual rights" (as well as with the rights of the individual employees) (461 U.S. at 771; *id.* at 770). The Court further noted that "conferring such power on the [EEOC] and an employer * * * would be unlikely to further *true conciliation between all interested parties*" (*ibid.* (emphasis added)), reasoning that, "[a]lthough an innocent union might decide to join in Title VII conciliation efforts in order to protect its contractual position, neither the employer nor the [EEOC] would have any incentive to make concessions to the union * * * [since they] would know that they could agree without the union's consent and that their agreement would be enforced" (*ibid.*). And, conversely, the Court added, "enforcing the award * * * should encourage conciliation and *true voluntary compliance with federal employment discrimination law*" since it would require that all employees' rights be respected in Title VII settlement negotiations (*ibid.* (emphasis added)).

Similarly, in *Firefighters* v. *Cleveland*, *supra*, where an employer and a minority-plaintiff class entered into a consent decree providing for the use of race-conscious remedies, the Court held that, while the policy favoring

voluntary settlement of Title VII suits does not bar a court from approving such race-conscious decrees, neither does that policy preclude a union representing nonminority employees from challenging such a decree on its merits. On the one hand, the Court noted, "[i]t has never been supposed that one party—whether an original party, a party that was joined later, or an intervenor—could preclude other parties from settling their own disputes and thereby withdrawing from the litigation[;] [t]hus, while [such a party] is entitled to present evidence and have its objections heard at the hearing on whether to approve a consent decree, it does not have power to block the decree merely by withholding its consent" (slip op. 26). On the other hand, the Court added, "parties who choose to resolve litigation through settlement may not dispose of the claims of a third party * * * without that party's agreement"; "[a] court's approval of a consent decree between some of the parties * * * cannot dispose of the valid claims of nonconsenting [third-parties]" (*ibid.*). Rather, the Court concluded, "if properly raised, these claims remain and may be litigated by the [third-party]" (*ibid.*). Accord, *id.* at 1-2 (O'Connor, J., concurring).

The Court's analysis in *W.R. Grace & Co.* and *Firefighters* v. *Cleveland* is therefore dispositive of both the voluntary settlement issue and, indeed, the larger collateral attack question at issue here. For one thing, it is a gross overstatement to suggest, as did the court below (Pet. App. A11), that a "settlement would have no utility if it failed to prevent further litigation of the matter."[13] As noted in *W.R. Grace & Co.*, to the extent the

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[13] Indeed, since the court below also suggested that the *Marino* petitioners should have intervened in the *Hispanic Society* and *Guardians Association* litigation (Pet. App. A12), this statement makes little sense at all. The parties' incentive to settle the *Hispanic Society* and *Guardians Association* litigation would have been similarly affected had the *Marino* petitioners intervened there. The parties' incentive to settle would be increased, if at all, only if the *Marino* petitioners had no means for challenging any settle-

parties are compromising their own claims and thus sharing the cost of settlement among themselves, very little reduction in settlement incentives should occur. The parties' incentive to settle would be eroded only to the extent that the settlement might give rise to liability on their part to the *Marino* petitioners (for the costs of the settlement, if any, that the *Marino* petitioners have been improperly asked to bear). Even then, it would appear that the diminution of incentive to settle between the existing parties would be no greater than is appropriate in light of the economic benefits that the settlement will have for them. In any event, as both *W.R. Grace & Co.* and *Firefighters* v. *Cleveland* note,[14] the policy favoring voluntary settlement of Title VII claims is merely part of a more general policy of promoting voluntary compliance with the statute. That more general policy is promoted only where *all* persons with an interest in a Title VII dispute are party to a resulting consent decree or, in the absence of such consensus, where any consent decree that results can withstand substantive challenge from adversely affected third-parties. Compliance with Title VII is not encouraged when parties are allowed to ignore and, indeed, abrogate the rights of those who are not present. Accord, Comment, *Collateral Attacks on Employment Discrimination Consent Decrees*, 53 U. Chi. L. Rev. at 168-172.

d. Indeed, because of the strict rules concerning timeliness of intervention that have been applied by several courts of appeals, application of the collateral attack doctrine may leave many interested third-persons without

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ment that was reached in the *Hispanic Society* and *Guardians Association* litigation.

[14] See also *Firefighters* v. *Stotts*, 467 U.S. at 588 n.3 (O'Connor, J., concurring) ("if innocent employees are to be required to make any sacrifices in the final consent decree, they must be represented and have had full participation rights in the negotiation process"); *id.* at 589 n.4 ("[t]he policy favoring voluntary settlement does not, of course, countenance unlawful discrimination against existing employees or applicants").

any opportunity to be heard at all. Though we do not agree with them, several courts of appeals, including the Second Circuit, have held that the timeliness of intervention must be measured from the date upon which a complaint or proposed consent decree is filed, rather than from the date on which the would-be intervenors' cause-of-action allegedly accrued, whether their interests have been adversely affected at that earlier time or not. See, *e.g.*, *United States* v. *Yonkers*, 801 F.2d 593, 594-596 (2d Cir. 1986); *Deveraux* v. *Geary*, 765 F.2d 268, 271-275 (1st Cir. 1985), cert. denied, No. 85-492 (July 7, 1986); *Corley* v. *Jackson Police Dep't*, 755 F.2d 1207, 1209-1210 (5th Cir. 1985). Thus, it may well be impossible for third-parties (in the Second and other Circuits) to intervene and challenge a proposed consent decree: On the one hand, before the consent decree is made public, they may not be aware that it has been proposed or they may not yet have suffered (and may never suffer) the concrete injury on which they can properly base a motion for intervention. See, *e.g.*, *Firebird Society* v. *Bd. of Fire Commissioners*, 66 F.R.D. 457 (D. Conn.), aff'd mem., 515 F.2d 504 (2d Cir.), cert. denied, 423 U.S. 867 (1975). And, on the other hand, if they delay their attempt at intervention (until their speculative interest becomes concrete), they will quite likely be turned away as having moved untimely to intervene.[15] It is therefore ironic that the court below would defend its application of the collateral attack doctrine by reference to intervention principles; in fact, as applied by the courts of appeals (including the circuit below), the two doctrines have combined to create a pincers movement denying interested third-persons all possible recourse against consent decrees to which they object, thus completely depriving them of their rights under the Due Process Clause and the federal rules of procedure.

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[15] Moreover, even where intervention is held timely, the interested third-persons are only allowed to voice their objections to the "reasonableness" of the decree. See, *e.g.*, *Kirkland* v. *New York State Dep't of Correction Services*, 711 F.2d 1117, 1129 (2d Cir. 1983). This limited right of allocution before judgment is not the full and fair opportunity to be heard that due process requires that a

3. For these reasons, the collateral attack doctrine has been criticized and rejected by members of this Court and by various courts of appeals. For example, in *Ashley* v. *City of Jackson*, 464 U.S. at 901-902, 904, then-Justice Rehnquist, joined by Justice Brennan, found himself "at a loss to understand the origins of the doctrine of 'collateral attack' "; he concluded that there is "no justification, either in general principles of preclusion or the particular policies implicated in Title VII suits, for [a district court's] refusal to take jurisdiction [in such a] case." Similarly, in *United States* v. *Jefferson County*, 720 F.2d 1511, 1518 (1983), after reviewing the cases approving the "collateral attack" doctrine, the Eleventh Circuit refused to "follow this path to the extent that it deprives a nonparty of the decree to his day in court to assert the violation of his civil rights." Indeed, a panel of the Fifth Circuit, which has adopted the "collateral attack" rule, has suggested the need for a "reexamination of [that] doctrine in the appropriate forum, particularly in light of the persuasive opinion of Justice Rehnquist, joined by Justice Brennan, * * * in [*Ashley* v. *City of Jackson*, 464 U.S. 900 (1983)]" (*Corley* v. *Jackson Police Department*, 755 F.2d 1207, 1210 (1985)). See generally *Feller* v. *Brock*, 802 F.2d 722, 727-729 (4th Cir. 1986). We agree and accordingly submit that the Court should jettison the "collateral attack" doctrine now.

II. INDIVIDUALS WHO HAVE NOT MOVED TO MAKE THEMSELVES A FORMAL PARTY TO AN ONGOING TITLE VII SUIT ARE NOT ENTITLED TO APPEAL THE ENTRY OF A CONSENT DECREE IN THAT LITIGATION

The court below also held that the *Costello* petitioners had no right to appeal the district court's entry of the final consent decree in the consolidated *Guardians Association/Hispanic Society* litigation. While we do not entirely agree with the analysis of the court below, we do agree with its holding.

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person ultimately receive—as this Court has said. See *Firefighters* v. *Cleveland*, slip op. 26-27.

A. This Court has long held that persons who have not formally made themselves party to litigation have no right to appeal orders entered therein. See, *e.g.*, *Auto Workers* v. *Schofield*, 382 U.S. 205, 209 (1965); *United States ex rel. Louisiana* v. *Jack*, 244 U.S. 397, 402 (1917); *Ex parte Leaf Tobacco Bd. of Trade*, 222 U.S. 578, 581 (1911); *South Carolina* v. *Wesley*, 155 U.S. 542, 545 (1895). The term "party" includes not only the original litigants, but also those who have intervened, been substituted, or joined at a later time. See *United States* v. *LTV Corp.*, 746 F.2d 51, 53 (D.C. Cir. 1984). Otherwise, however, the "orderly adjudication of contesting rights" (*United States* v. *Seigel*, 168 F.2d 143, 146 (D.C. Cir. 1948)) and the constitutional and prudential concerns underlying standing doctrine (see *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534, 543-545 (1986); *West* v. *Radio-Keith-Orpheum Corp.*, 70 F.2d 621, 624 (2d Cir. 1934) (opinion of Hand, J.)) require that persons be precluded from appealing judgments to which they are not bound.

The *Costello* petitioners clearly were not parties to, and thus are not bound by, the consent decree entered in the *Hispanic Society/Guardians Association* litigation. They were not among the original contestants in the district court; they did not attempt to intervene; they were not substituted for another party; and they were not joined. They did not even participate in the negotiation of the interim or final consent orders. They merely filed written objections to the proposed decree and, through counsel, argued at the fairness hearing against the final decree's entry. That the definitional provisions of the consent decree arguably name them as "defendants" does not bind them to the district court's judgment or establish their party status. "Just as the settlement cannot divest a plaintiff or defendant of party status in the litigation, it cannot confer party status on a nonparty" (Pet. App. A70). Moreover, "[t]his provision of the settlement simply binds [the *Costello* petitioners] to comply with its terms in their official capacities as employees of the de-

fendants, and does not give them standing to raise their current objections to the settlement as violative of their individual rights" (*ibid.*). In short, the *Costello* petitioners, like an *amicus curiae*, were nothing more than interested bystanders and, accordingly, were correctly held to be without any right of appeal.

B. On a few isolated occasions, this Court has suggested, always in dicta, that there may be exceptions to the rule against nonparty appeals. See *United States ex rel. Louisiana* v. *Jack*, 244 U.S. at 402; *Ex parte Cockroft*, 104 U.S. 578, 579 (1881); *Ex parte Cutting*, 94 U.S. 14, 20-22 (1876). Based on this dicta, a few courts of appeals have allowed nonparties to prosecute appeals. See, *e.g.*, *Citibank Int'l* v. *Collier-Traino, Inc.*, 809 F.2d 1438, 1441 (9th Cir. 1987) (citing other Ninth Circuit cases as well); *Martin-Trigona* v. *Shiff*, 702 F.2d 380, 385-386 (2d Cir. 1983) (citing other Second Circuit cases as well); but see *United States* v. *LTV Corp.*, 746 F.2d at 53-55 (no non-party appeals allowed). The court below similarly suggested that some such exceptions to the rule against nonparty appeals might exist, but found "none is relevant to the present matter" (Pet. App. A67). Although circumstances we have not been able to envisage may suggest a contrary conclusion, on the basis of our research and reflection, we are unable to understand either the source of or the need for any such exceptions.

The Federal Rules of Appellate Procedure are unambiguous concerning who may file an appeal. Rule 3(c) clearly states that "[t]he notice of appeal shall specify the *party* or *parties* taking the appeal • • •" (Fed. R. App. P. 3(c) (emphasis added)). This "clear and simple rule" admits no exceptions (*Moten* v. *Bricklayers Int'l Union*, 543 F.2d 224, 227 (D.C. Cir. 1976)). Moreover, as noted earlier (see pages 11-26, *supra*), persons aggrieved by conduct resulting from a judgment or consent decree to which they are not party may assert their claims in separate, collateral actions. Accord, *Firefighters* v. *Cleveland*, slip op. 26-27; *W.R. Grace & Co.* v. *Rubber Workers*, 461

U.S. at 770-772. Indeed, if they wish to file an appeal from the original judgment, they may file a motion for post-judgment intervention and, of course, appeal the denial of any such motion. Accord, *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 395 (1977); *United States* v. *LTV Corp.*, 746 F.2d at 54 n.9; *In re Proceedings Before the Federal Grand Jury*, 643 F.2d 641, 643 (9th Cir. 1981). Because nonparty appeals are without either apparent authority or necessity, and because substantial constitutional and prudential reasons weigh against nonparty appeals (see *Bender* v. *Williamsport Area School Dist.*, 475 U.S. at 543-545; *United States* v. *Seigel*, 168 F.2d at 146), judicially crafted exceptions to the rule against nonparty appeals should be resisted.[16]

In any event, except for the court below,[17] those courts which have allowed nonparty appeals have done so only where the nonparties have actively participated in the district court and the equities strongly favor allowing an appeal to go forward. They have considered such factors as whether the district court invited the nonparty to participate in the litigation, whether the nonparty attempted to intervene, the extent to which the nonparty did in fact participate, and the extent to which the district court's judgment has affected the nonparty's interests. See *Citibank Int'l* v. *Collier-Traino, Inc.*, 809 F.2d at 1441; *Bank of America* v. *M/V Executive*, 797 F.2d 772, 774 (9th Cir. 1986); *Martin-Trigona* v. *Shiff*, 702

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[16] We note that when it intimated that there may be exceptions to the rule against nonparty appeals, the Court apparently was under the impression that orders denying motions to intervene were unappealable. See *United States ex rel. Louisiana* v. *Jack*, 244 U.S. at 402; *Ex parte Leaf Tobacco Bd. of Trade*, 222 U.S. at 581; *Ex parte Cutting*, 94 U.S. at 22. That clearly is no longer the case. See *United Airlines, Inc.* v. *McDonald*, 432 U.S. at 395.

[17] The exception articulated by the court below would all but swallow the rule against nonparty appeals and must be rejected. Accord, *United States* v. *LTV Corp.*, 746 F.2d at 53-54. Almost any person with an interest in intervening could show that he or she is privy to the record and "has an interest that is affected by the trial court's judgment" (Pet. App. A67).

F.2d 380, 385-386 (2d Cir. 1983); *SEC* v. *Lincoln Thrift Ass'n*, 577 F.2d 600, 603 (9th Cir. 1978). Here, the district court did not invite the *Costello* petitioners to participate as parties in the proceedings, and the *Costello* petitioners made no attempt to participate in the consent decree negotiations or to intervene before or after the entry of the consent decree. See Pet. App. A76-A78. Their participation was limited to the submission of written and oral objections concerning the entry of the final consent order and, even here, they submitted "no affidavits or other sworn allegations describing their individual status as police officers or as candidates for sergeant" (*id.* at A77). Accordingly, there is no basis upon which to evaluate the effect of the district court's judgment on the *Costello* petitioners' interests. Thus, the equities must be held to weigh against their request for a nonparty appeal.

CONCLUSION

The judgment of the court of appeals should be affirmed in part, reversed in part, and remanded for further proceedings consistent with the position advanced herein.

Respectfully submitted.

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OPPOSITION BRIEF

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No. 86-1415

In the Supreme Court of the United States

OCTOBER TERM, 1987

EVELYN MARINO, ET AL.,
Petitioners,

-against-

JUAN U. ORTIZ, ET AL.

WAYNE COSTELLO, ET AL.,
Petitioners,

-against-

THE NEW YORK CITY POLICE DEPARTMENT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF FOR THE GUARDIANS ASSOCIATION OF THE POLICE DEPARTMENT OF THE CITY OF NEW YORK, INC.

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QUESTIONS PRESENTED

1. Whether individuals who have not moved to make themselves parties to an ongoing Title VII suit may appeal the entry of a consent decree in that litigation?

2. Whether individuals who failed to intervene in an ongoing Title VII suit and who have no interest in the outcome of the litigation, but who were recognized and stated their position at the F.R.C.P. 23 (e) fairness hearing, are barred from collaterally challenging employment-related actions taken pursuant to a consent decree entered in that litigation?

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STATEMENT

This appeal is from a decision of the United States District Court, Southern District of New York (Robert L. Carter, Judge), affirmed by the Second Circuit Court of Appeals, which approved a settlement in a consolidated Title VII action, 42 U.S.C. §2000e *et seq.*, alleging employment discrimination.

In the fall of 1984, companion lawsuits were initiated by both Hispanic and black police officers challenging the New York City Civil Service Examination for the position of sergeant in the New York City Police Department. Both groups of minority police officers alleged that the examination violated Title VII in that it had an adverse impact upon them, and could not be established as an accurate predictor of success on the job.

The challenged Examination (#2548) was originally given in 1983. Because of technical difficulties, a portion of the test had to be regiven in April 1984 (A-83).[1] Thus, the results were not known until August, 1984, at which time the New York City Police Department established an eligible list generated by Examination #2548 (A-3). Petitioners Wayne Costello et al., were not included on this eligible list. In the vernacular, the Costello petitioners

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[1] Citations to the record on appeal will be as follows: documents in the Appendix to the Petition for Writ of Certiorari shall be cited to by "A" and page number; documents in the Joint Appendix shall be cited to by "JA" and page number; and the document not in the appendix (Interim Order) shall be cited as previously stated together with the Docket Number (HR19) and the page number, if appropriate. There are a number of misspellings and other errors in the appendices; the parts of the record that are quoted in this Brief are set forth without these errors.

FAILED Examination #2548.[2]

The eligible list generated by Examination #2548 was composed of approximately 1,041 police officers. Hispanics comprised 8.7% of the test takers and blacks comprised 12.3% of the test takers; yet the eligible list included only 44 Hispanics (4.23%) and 24 blacks (2.3%). The success rate for those taking the test was 10.61% for whites, 4.39% for Hispanics and 1.69% for blacks (A-3-4, 85). By all applicable legal standards, Examination #2548 had an adverse impact on both Hispanic and black applicants (A-4, 85, 97).

During the course of extensive discovery, three "classes" of intervenors moved for and were granted party status. These three "classes" were the Sergeants' Benevolent Association (representing the interests of 534 individuals who were provisionally appointed to sergeant prior to January 1, 1985), the Sergeants Eligibles Association (representing all other individuals on the eligible list generated by Examination #2548), and five non-minority ethnic associations (A-4).

After extensive discovery, the defendants recognized

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[2] Petitioners at bar Wayne Costello *et al.*, shall hereinafter be referred to as "Costello". Because all of the individual Marino petitioners are included among the Costello petitioners, the entire group will be referred to as Petitioners Costello. It has been alleged that there are 350 police officers in the Costello group, although only 41 filed objections with the District Court (A-93). Moreover, since the decision in the Court of Appeals, over 700 additional police officers were added to the eligible list as the result of litigation in the New York State courts. Most of these officers have also been promoted, including over half of the Petitioners.

that despite their best efforts, they could not meet the burden of establishing the affirmative defense that Examination #2548 was job related (A-4). Because they could not establish that Examination #2548 was an accurate predictor of success on the job, and it was beyond dispute that the test had an adverse impact, it was obvious to defendants that a clear violation of Title VII had occurred. The defendants could not successfully defend Examination #2548 (A-4, 97). Discrimination by a governmental body serves a doubly destructive purpose in that it creates mistrust, alienation and all too often hostility towards the entire process of government. Defendants decided to settle the litigation (JA-143-156).

In fashioning a settlement, defendants considered the alternatives in order to narrowly tailor a remedy. Defendants specifically considered whether alternatives and/or less restrictive means could have been used. The alternatives considered were: (1) making no promotions from the eligible list generated by Examination #2548; or (2) making as many promotions as were needed while eliminating the adverse impact on blacks and Hispanics created by Examination #2548 (JA-157-164). Defendants accepted the second alternative because the abrogation of the promotional list would have automatically rescinded the appointments of over 500 individuals who had been serving as provisional police sergeants for over a year (JA 167-8). Further, the substantial need for sergeants mandated that new sergeants be promoted (JA-157-164). Only one-half of the budgeted 2800 New York City Police Department Sergeant positions were filled with permanent appointments when defendants agreed to settle the litigation.

The agreed-to-settlement provided for the promotion of ALL persons on the eligible list generated by Examination #2548 plus additional Hispanic and black police

officers to eliminate adverse impact (A-162). The settlement was agreed to after arms-length negotiations by all of the plaintiffs and defendants as well as two of the three defendant-intervenor groups (the Sergeant's Benevolent Association representing the 534 sergeants who had been provisionally promoted, and the "Sergeant's Eligibles Association" representing other police officers on the eligible list) (A-95-6). Another defendant-intervenor, Robert Hyman *et al.*, representing several individual police officers on the eligible list as well as 5 non-minority ethnic organizations of police officers, did not sign the settlement agreement.[3] Accordingly, since the definitions used in the agreement delineated the parties thereto, this group was not defined in the settlement agreement as intervenor-defendants (A-81).

The settlement agreement was executed in January 1986, and a hearing on the settlement was held on April 17, 1986. The settlement was supported by its signatories and opposed by intervenor-defendant Hyman. Kenneth Gordon, Esq. was given permission by the Court to speak regarding the concerns of individual New York State Court clients he represented. Petitioners Costello were permitted to speak by their attorney Ronald Podolsky, Esq. A group of individual police officers, representing themselves *pro se*, were not permitted to orally argue their positions although all written objections were accepted and considered by the Court (A-89-91, 93). Petitioners Costello argued that since they had scored as well as or better than the Hispanic and/or black police officers who had been promoted to eliminate the adverse racial impact

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[3] The non-minority ethnic societies are The Emerald Society, the Columbia Association, the Shomrim Society, the St. Paul Society, and the Steuben Society.

of Examination #2548, they too should be promoted (A-16-29).[4] After a full hearing, the District Court found the settlement fair and adequate as well as consistent with the dictates of Title VII and the United States Constitution.

Petitioners appealed to the United States Circuit Court for the Second Circuit. The Second Circuit on appeal rejected Petitioners' argument that they had standing to appeal. The Court concluded that as individuals who had initially failed Examination #2548, Petitioners Costello did not have a "viable claim", that they should not be incorporated on the eligible list, and that they did not have an interest in the litigation:

> "In this case, appellants were not on the original eligible list, they have no right to promotion under state law, and they do not allege that the examination discriminated against them. Even if the settlement were invalidated, therefore, they would not be entitled to promotion. Accordingly, they cannot appeal from the settlement as non-parties with an interest in the order below" (A-68).

After the entry of the Interim Order in the *Hispanic Society* litigation (HR-19) which resulted in the promotion

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[4] This, of course, would recreate the adverse impact created by Examination #2548. Although they failed the examination, Petitioners seek to be promoted to the position of sergeant, but without regard to the continuing requirement of eliminating the Examination's adverse impact. Promotion of Petitioners Costello would perpetuate the adverse impact the settlement was designed to eradicate.

of several Hispanics and blacks not previously on the eligible list, the Costello Petitioners filed a complaint against the City of New York entitled *Marino v. Ortiz* (A-14-29). The complaint did not include the Hispanic Society or Guardians Association plaintiffs as defendants pursuant to F.R.C.P. 19. Nor did the complaint mention the race of the Petitioners, nor the race of those who had been promoted, nor even the Interim Order. It simply alleged that "some" had been promoted with examination scores like the Petitioners (A-14-29). It was claimed that the equal protection clause of the Fourteenth Amendment required that all individuals with scores equal to the scores of those who were promoted had to be added to the eligible list and promoted irrespective of any time limitation. (A-28-29). Pursuant to the Local Rules of the Southern District, the case was assigned to Judge Carter, the District Court Judge who was presiding over the *Hispanic Society* litigation.

The City moved to dismiss the complaint for failure to state a claim for relief and as a collateral attack on the settlement in *Hispanic Society* (A-30). Their moving papers unequivocally pointed out that the Marino petitioners' remedy was to intervene in the *Hispanic Society* litigation (A-37).

The Marino petitioners responded to the motion by requesting summary judgment (A-39). They claimed that their complaint did not allege racial discrimination and that they only wanted to be promoted because they had scores similar to those already promoted (A-48-49).[5] They argued that they were not mounting a collateral attack on

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[5] On appeal to the Court of Appeals, petitioners also maintained that they were not alleging "reverse discrimination." Now, for the first time, petitioners claim racial discrimination. See e.g., Petitioners' Brief at 15, 28, etc.

the *Hispanic Society* settlement since they were not seeking to have anyone denied a promotion. Their argument was simply that the Fourteenth Amendment required that they be promoted also.[6]

As stated above, the Petitioners had argued this same position at the hearings on the settlement in *Hispanic Society*; and the District Court adhered to the position it advanced at those hearings, to wit, that Petitioners' argument was frivolous. In a Memorandum Endorsement the District Court dismissed the complaint citing *Prate v. Friedman*, 430 F.Supp. 1373, 1375 (W.D.N.Y.), *aff'd mem.*, 573 F.2d 1294 (2d Cir. 1977), *cert. denied*, 436 U.S. 922 (1978) (A-13). *Prate* was a very similar lawsuit which was dismissed as an improper collateral attack on a settlement and for failure to state a claim for relief under the Fourteenth Amendment.

The Court of Appeals affirmed the dismissal of the Costello Petitioners' *Marino* complaint. It held that the complaint was an improper collateral attack on the *Hispanic Society* settlement. The Court also held that since Petitioners had actually presented their claims at the settlement hearing in *Hispanic Society*, and the District Court had considered and rejected those claims, Petitioners were barred from relitigating the issue in *Marino*. *Marino v. Ortiz*, 806 F.2d 1144, 1147 (2d Cir. 1986). The Court of Appeals stated:

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[6] Under the logic of Petitioners' argument as already stated, all 12,000 who took the examination would be promoted. Under the terms of the settlement the City can promote only by continuing to offset the disparate impact. Thus, if Petitioners are promoted, additional minorities must also be promoted. This, in turn, will create a new group of persons like Petitioners who have scores equal to some of the minorities promoted. This could continue until essentially everyone was promoted.

"Not only did appellants have notice of the proceedings in Hispanic Society and a suggestion to intervene therein, but they actually presented their claims at the objector hearing in that case. Judge Carter considered appellants' claims, and found them to be without merit. Thus, appellants had the opportunity to engage in the original lawsuit and actually presented their claims. As we have said in an analogous context, '[t]he efficient and fair administration of justice requires that litigation of an issue at some point come to an end. And for the appellant, who has had one opportunity already to contest the ... order, the time to relitigate that issue has necessarily run.' *Class v. Norton*, 505 F.2d 123, 125 (2d Cir. 1974)."

806 F.2d at 1147.

Police Officers like Petitioners Costello who are not on the eligible list generated by Examination #2548 are not forever barred from promotion. If additional sergeants are needed (and such additional promotions are inevitable), Petitioners Costello may be promoted as long as additional minorities are also promoted to eliminate adverse impact. Petitioners' Brief at 53. In fact, because of the re-rating which occurred in the New York State Courts, over 50% of the individual petitioners passed Examination #2548 and were promoted to the position of Police Sergeant. Additional blacks and Hispanics who failed Examination #2548 were also promoted along with some of the Petitioners. Petitioners' Brief at 53.

The settlement approved in *Hispanic Society* is an interim measure covering appointments made from

challenged Examination #2548. The defendants, with the assistance of two experts retained by the United States Department of Justice as well as an expert provided by plaintiffs, have begun the development of a new examination. This collaborative effort will hopefully produce a future examination for the position of sergeant which does not generate an adverse impact on Hispanic and black candidates.

POINT I

PETITIONERS COSTELLO HAVE NO STANDING TO APPEAL.

Petitioners Costello were not parties to the litigation, and they did not move to intervene before the District Court. Accordingly, Petitioners Costello have no standing to appeal. *United States ex rel. Louisiana v. Jack*, 244 U.S. 397 (1917).

Petitioners Costello were permitted, by their attorney, to speak at the April 17, 1986 hearing on objections to the settlement. Another attorney, Kenneth Gordon, was also permitted to speak at the hearing. However, neither Mr. Gordon's clients nor Petitioners Costello acquired the status of parties to the litigation by speaking at the hearing. *United States v. LTV Corp.* 746 F.2d 51 (D.C. Cir. 1984); *Moten v. Bricklayers*, 543 F.2d 244 (D.C. Cir. 1976); *Commonwealth of Pennsylvania v. Rizzo*, 530 F.2d 501 (3rd Cir. 1976); *cert. denied* 426 U.S. 921 (1976).

Petitioners Costello insinuate, at p. 33 of their Brief, that because they are police officers employed by the City of New York they are "defendants", and thus "parties" to the litigation with standing to appeal. This erroneous

assertion is premised entirely upon one of the "Definition" paragraphs contained in the settlement agreement, which states:

> "The 'New York City defendants' shall mean and refer to the City of New York, the New York City Police Department, the New York City Department of Personnel, and all officers, employees or agents, whether elected or appointed, of the City of New York, but not including the *Hispanic Society* plaintiffs, the *Guardians Association* plaintiffs, the intervenor-defendants or any individuals or groups represented by the *Hispanic Society* plaintiffs, the *Guardians Association* plaintiffs, or intervenor-defendants." (JA-65-66).

By its very terms, however, the definition cited by Petitioners Costello is "as used in this agreement". The applicable phrases delineate the parties to the agreement; they do not define the parties to the litigation. This can readily be seen from the term "Intervenor-Defendants", which is defined to "mean and refer to the Sergeants Benevolent Association and the Sergeant's Eligible Association." The definition omits the defendants-intervenors Robert Hyman *et al.* No party to this appeal denies that this group, consisting of 5 non-minority ethnic organizations and several individual police officers, were intervenor-defendants [see the back cover of the Joint Appendix]; yet by the logic of Petitioners' argument these intervenors were divested of party status because they were omitted from the definition contained in the settlement. The settlement cannot divest a party of status in the litigation; neither can it confer status upon a non-party.

Further, the settlement agreement made clear that the

"officers, employees or agents" of the City referred to were individuals having some connection with or responsibility for Examination #2548, or for the selection/promotion of sergeants therefrom. Thus, the agreement acknowledged that the New York City defendants intended to use the "results of Civil Service Examination #2548 for the selection of individuals for promotion to the rank of sergeant" (JA-53); it provided that "the cut-off point for Eligible List No. 2548 was set by the New York City defendants" (JA-57); it recognized that "the New York City defendants ... have concluded ... that they would be unable to carry the extraordinary burden of proof that is imposed on employers in cases in which disparate impact analysis is used" (JA-60); it acknowledged that in the absence of an agreement providing for promotions in a manner which would reasonably accommodate the interests of the parties "it probably would be necessary for the New York City defendants to demote all police officers provisionally promoted to the rank of Sergeant from Eligible List No. 2548" (JA-63); and it accordingly declared that "the New York City defendants shall promote" a sufficient number of Hispanic and black police officers to the rank of Sergeant in ratios corresponding to the percentage of officers in each group who took Examination #2548 (JA-71-5) and that the "New York City defendants shall pay back pay to each member of the plaintiff classes who would have been promoted if this agreement has been in effect at the time that provisional promotions were made" (JA-76-8). The settlement agreement thus described the "New York City defendants" as employers—a category into which Petitioners Costello cannot squeeze under any version of the facts.

Petitioners Costello were not parties to the litigation, and they did not move to intervene. By failing to do so, Petitioners Costello lacked standing to appeal from the District Court's decision. Under such circumstances,

their appeal was frivolous and was properly dismissed.

POINT II

THE MARINO COMPLAINT WAS PROPERLY DISMISSED AS AN IMPERMISSIBLE COLLATERAL ATTACK UPON A CONSENT DECREE

As a rule, collateral attacks on Title VII consent decrees are impermissible. *Prate v. Friedman* 430 F. Supp. 1373 (W.D.N.Y.) *aff'd mem* 573 F. 2d 1294 (2nd Cir. 1977), *cert. denied* 436 U.S. 922 (1978); *Thaggard v. City of Jackson*, 687 F. 2d 66 (5th Cir. 1982), *cert. denied sub nom. Ashley v. City of Jackson*, 464 U.S. 900 (1983); *Dennison v. City of Los Angeles Department of Water and Power*, 658 F. 2d 694 (9th Cir. 1981); *Grann v. City of Madison*, 738 F. 2d 786, 796 (7th Cir.), *cert. denied*, 469 U.S. 918 (1984); *Stotts v. Memphis Fire Dep't.*, 679 F. 2d 541, 558 (6th Cir. 1982) *rev'd on other grounds sub nom. Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Culbreath v. Dukakis*, 630 F. 2d 15, 22 (1st Cir. 1980); *O'Burn v. Shapp*, 70 F.R.D. 549 (E.D. Pa. 1976), *aff'd mem sub nom. Lutz v. Shapp*, 546 F. 2d 417 (3rd Cir. 1976), *cert. denied*, 430 U.S. 968 (1977). Cf. *United States v. Jefferson County*, 720 F. 2d 1511, 1518 (11th Cir. 1983).

Accordingly, the sole question at bar is whether this Court should sanction or reject the collateral attack doctrine. Petitioners, joined on this issue by the United States, call upon the Court to abandon the collateral attack rule upon Constitutional grounds in order to permit Petitioners a full hearing on the "merits" of their claims. Both Petitioners and the United States argue that the Due Process Clause of the Fifth Amendment operates as a check upon the extent to which the Federal Courts can

make a judgment or consent decree conclusive upon persons who were not actual parties to the litigation. The United States therefore asserts that Petitioners are entitled to "the full and fair opportunity to be heard that due process requires that a person ultimately receive ..." (United States Brief p. 25, N. 15). Thus, on due process grounds, as guaranteed by the Fifth Amendment, the United States argues that the Costello Petitioners should be allowed to institute a collateral attack upon the *Hispanic Society* consent decree. This Court accordingly must decide Petitioners' due process right to a hearing.

The Fifth Amendment to the United States Constitution states:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation." (Emphasis added.)

Thus the concept of due process is interrelated with the rights of life, liberty or property. "[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstance. [D]ue process is flexible and calls for such procedural protections as the particular situation demands."

Mathews v. Eldridge, 424 U.S. 319, 324 (1975); citations omitted.

To determine the exact contours of the due process required in each specific situation this Court has enunciated three factors to be considered:

> 1. The private interest affected;
> 2. The risk of an error depriving an individual of his interest, and the probable value of additional procedural safeguards; and
> 3. The government's interest in the matter at hand.

Ibid., p. 335. Consideration of all of these elements, however, leads to the inescapable conclusion that Petitioners are <u>not</u> entitled to a full hearing under the facts of this case.

(a) Petitioners at bar have <u>NO</u> private interest that was affected by the consent decree. Petitioners <u>failed</u> Examination #2548. If the *Hispanic Society* and *Guardians Association* litigation had not been initiated, Petitioners could not compel the City defendants to add their names to the eligible list. They have no property right to either placement on the eligibility list or appointment. *Cassidy v. Municipal Civil Service Commission*, 37 N.Y. 2d 526 (1975).

Neither Petitioners nor the United States have defined the wellspring generating Petitioners' alleged private interest. Said alleged interest does not affect Petitioners' life or liberty; the sole possible interest Petitioners can claim is a property right. But as this Court has held many times:

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

Board of Regents v. Roth, 408 U.S. 564 (1972); see *Arnett v. Kennedy*, 416 U.S. 134, 151 (1973) as per Justice [now Chief Justice] Rehnquist. As in *Arnett v. Kennedy, supra* at 155, the case at bar is concerned initially with the "area of governmental employer-employee relationships ... ". From these relationships flows Petitioners' entitlement, if any, to a hearing.

Pursuant to New York State Law governing the promotion of Civil Service Employees, Petitioners have no reasonable expectation of placement on the eligible list and/or appointment. *Cassidy v. Municipal Civil Service Commission, supra*. Thus they have no due process right to a hearing. Further, as this Court stated in *Board of Regents v. Roth, supra* (408 U.S. at 577):

> "Certain attributes of 'property' interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their

> daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims."

Do Petitioners at bar have even a unilateral expectation of placement upon the Sergeant's eligible list and promotion? From what New York State law springs their claim to secure this placement or promotion? Surely, they do not have even a remote claim under New York law to be placed on the eligibility list or to be promoted to the position of police sergeant. Thus, they have no due process right to a hearing.

Petitioners are not "innocent" white employees with a legitimate claim to the eligibility list and promotion. All whites with a legitimate claim to promotion, i.e. those on the eligibility list, have already received promotion. Petitioners are "jealous" whites; jealous because other failing test takers were promoted solely to undo the disparate impact of a racially discriminatory test.

(b) Additional procedural safeguards were, in fact, available to protect Petitioners' "rights". They were allowed to appear and to be heard at the class action Fairness Hearing, and defendant City of New York clearly called Petitioners' attention to the fact that they ought to move to intervene in the *Hispanic Society* litigation. Thus, the "risk of an error" which might deprive Petitioners of their alleged "interest" was nonexistent.

Even assuming, *arguendo*, that Petitioners did have some cognizable interest in the litigation, any concomitant due process right conferred upon them was fully satisfied when they appeared at the Fairness

Hearing. "[T]he Fairness Hearing held before the consent decree was formally adopted adequately afforded [the objector] an opportunity to present to the court its views of the adverse impact of the decree on non-minority employees." *Dennison v. City of Los Angeles*, 658 F. 2d 694, 696 (9th Cir., 1981). By appearing and raising their objections at the Fairness Hearing, Petitioners at bar were afforded an opportunity to be heard which totally abrogated their claim, if any, to a lack of due process.

Further, it was strongly urged throughout the litigation that Petitioners move to intervene. They stubbornly refused to do so. Three previous motions to intervene had been granted by the Court, and there is nothing in the record to suggest that the outcome of such a motion by Petitioners would have been different. By purposely bypassing a more-than-adequate opportunity to intervene, Petitioners cannot now claim a failure of due process. Thus they are bound by the consent decree. See *Provident Bank v. Patterson*, 390 U.S. 102, 114 (1967).

(c) As far as the government's interest in the matter is concerned, the City of New York as a public employer had a compelling interest in settling once it realized that Examination #2548 was discriminatory. In *Wygant v. Jackson Board of Education*, ___ U.S. ___, 106 S.Ct. 842 (1986) this Court encouraged public employers like the City of New York, upon determining that they could not muster the proof required to defend a Civil Service Examination pursuant to Title VII, to voluntarily resolve the litigation. Voluntary compliance by a municipal employer is of great importance to further the objectives of Title VII. "The value of voluntary compliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance." *Wygant v.*

Jackson Board of Education, supra (O'Connor, J. concurring).

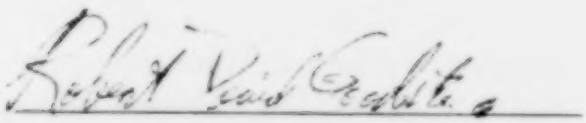
The Government thus has a strong interest in settling Title VII litigation voluntarily. This strong interest would truncate the due process to be afforded Petitioners even if they did have a property right in the subject eligibility list and appointment. But since they do not have such a property right, they are certainly not entitled to a due process hearing. Their appearance at the Fairness Hearing, although not required by the Due Process Clause, fulfilled any due process right Petitioners might claim to have. They are not entitled to an independent day in court.

On the facts of this case, the collateral attack rule barring separate complaints such as *Marino* should be affirmed. Due process does not require that Petitioners at bar receive a hearing. There is no reason whatever for the Court in this case to reject the rule barring collateral attacks on consent decrees.

CONCLUSION

For all of the above reasons, the decision of the Second Circuit in both *Hispanic Society* and *Marino* should be affirmed.

Respectfully submitted,



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RESPONDENT'S

BRIEF

Supreme Court, U.S.
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No. 86-1415

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

EVELYN MARINO, *et al.*,
Petitioners,
v.
JUAN U. ORTIZ, *et al.*

WAYNE COSTELLO, *et al.*,
Petitioners,
v.
THE NEW YORK CITY POLICE DEPARTMENT, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENT SERGEANTS BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK

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QUESTIONS PRESENTED

1. Should the issue of the failure of parties to a Title VII action challenging a civil service examination to join under Fed. R. Civ. P. 19 nonminority employees, who had no legitimate expectation of promotion on the basis of the examination before the commencement of the Title VII litigation, be addressed on a writ of certiorari in the Supreme Court when that issue was not raised at all before the district court and was not pressed in the court of appeals?

2. Can nonparties to a Title VII action object to the failure of parties to the action to join such nonparties pursuant to Fed. R. Civ. P. 19 when the nonparties were specifically encouraged to intervene in the Title VII action by one of the parties, the nonparties' representative filed objections to the proposed settlement of the case, the nonparties' representative appeared and was heard at the hearing to determine whether the settlement should be approved, and the district court in approving the settlement clearly considered and ruled on the objections expressed by the nonparties' representative?

3. Can nonminority employees, who had no legitimate expectation of promotion on the basis of a civil service examination before the commencement of Title VII litigation challenging that examination, and who declined to intervene in the Title VII lawsuit despite having received actual notice of the action and having been specifically encouraged to intervene by one of the parties to the Title VII case, be permitted to maintain a separate action in which they claim that settlement of the Title VII action in such a way as to eliminate the adverse racial impact from the examination creates in them a right to promotion that previously did not exist?

4. Are the rights of nonminority employees in any way infringed when they are precluded from maintaining

an action in which they assert that they too should be permitted to enjoy the benefits of the settlement of a Title VII action in which they were not parties when they were well aware of the pendency of the Title VII case, were aware that settlement of the case had been proposed and was imminent, were aware of the terms of the settlement of which they sought in their separate action to be beneficiaries, received actual notice of the detailed terms of the settlement before it was approved by the district court, were specifically encouraged to intervene in the Title VII action but refused to do so, were permitted to lodge objections to the settlement in the Title VII action prior to its approval by the district court, and had the basis for their objections considered and ruled on by the district court in its decision approving the settlement?

PARTIES TO THE PROCEEDING BELOW

Respondent Sergeants Benevolent Association of the City of New York accepts petitioners' statement of the parties to the proceeding below, with the following changes:

1. "Helene Renaldi" is the proper name of the party listed as "Melene Rinaldi" in the caption to the Petition for Writ of Certiorari.

2. Although not listed as such in the caption to the Petition for Writ of Certiorari, respondent Sergeants Benevolent Association of the City of New York was a party to the proceedings below.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1415

EVELYN MARINO, *et al.*,
Petitioners,

v.

JUAN U. ORTIZ, *et al.*

WAYNE COSTELLO, *et al.*,
Petitioners,

v.

THE NEW YORK CITY POLICE DEPARTMENT, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENT SERGEANTS BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Art. VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. amend V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

42 U.S.C. § 1983 (1986):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Fed. R. Civ. P. 12(b):

> **Rule 12. Defenses and Objections—When and How Presented—by Pleading or Motion—Motion for Judgment on the Pleadings**
>
> **(b) How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at

> the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Fed. R. Civ. P. 19:

> **Rule 19. Joinder of Persons Needed for Just Adjudication**
>
> **(a) Persons to be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person had not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.
>
> **(b) Determination by Court Whenever Joinder not Feasible.** If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus

regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

Fed. R. Civ. P. 24(a), (b):

Rule 24. Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone can be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

N.Y. Const. art. 5, § 6:

> Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive. . . .

STATEMENT OF THE CASE

This case presents for review the dismissal, in two different cases, of identical claims made by petitioners. In one case petitioners' claims were asserted in an original complaint that was dismissed by the district court, and this dismissal was affirmed by the court of appeals. In the other case, petitioners' claims were rejected by the district court and then dismissed by the court of appeals. An account of the proceedings in the two cases follows.

The Examination

The New York City Police Department ("NYCPD") administered Examination No. 2548 to some 11,899 candidates in June 1983 and April 1984. Based on a cut-off score that accounted for both exam results and seniority, an Eligible List of 1,041 persons was established and rank-ordered for promotions to sergeant. Test takers who did not meet the cut-off score, including petitioners, were deemed ineligible for promotion.

Although the racial composition of those taking Examination No. 2548 was 79% white, 12.3% black, and 8.7% Hispanic, the racial/ethnic breakdown of the Eligible List was 93.45% white, 2.30% black, and 4.23% Hispanic. Of all the candidates who took the examination, 8.95% were placed on the Eligible List. While 10.61% of the white candidates were placed on the Eli-

gible List, only 1.69% of the black candidates and 4.39% of the Hispanic candidates made the list.

The *Hispanic Society* Suit

In September and November, 1984, the Hispanic Society, representing Hispanic police officers, and the Guardians Association, representing black police officers, filed separate actions against NYCPD and various city officials (collectively referred to as "the City"), alleging employment discrimination in violation of Title VII and certain other provisions. A 80.[1] Both complaints alleged that Examination No. 2548 for sergeants had a gross disparate impact on black and Hispanic applicants both in terms of placement on the Eligible List and of rank ordering on that list. Both suits were certified as class actions, and the two suits were consolidated. A 81. These suits are hereinafter referred to as the "*Hispanic Society*" litigation.

Three groups were permitted to intervene as codefendants: the Sergeants Benevolent Association of the City of New York ("SBA") intervened on behalf of the interests of over 500 provisional appointees; the Sergeants Eligibles Association ("SEA") intervened on behalf of the interests of candidates on the Eligible List who had not yet been promoted; and various white ethnic societies

[1] References to "A" are to the Appendix to the Petition for Certiorari. References to "JA" are to the Joint Appendix. The Appendix to Petitioners' Reply Brief is cited as "Petitioners' Reply Brief at A—." References to the transcript of the April 17, 1986 hearing on the proposed settlement in the trial court are cited as "Tr." Citations to other pleadings and orders from the district court records set forth the name of the document cited, with the designation "HR" (for the *Hispanic Society* record), "GR" (for the *Guardians* record), or "MR" (for the *Marino* record), and the document number from the district court docket sheet for the document to which reference is made. Documents from the record in the court of appeals are cited by the name of the document, followed in parentheses by the date of the corresponding docket entry. Because the appendices filed by petitioners contain numerous typographical and other errors, quotations are for the most part drawn from original documents.

and individual officers (hereinafter "Schneider Intervenors") intervened on behalf of several of those officers who had taken Examination No. 2548 but had not scored well enough to be eligible for promotion. A 81-82. Both the SBA and SEA were certified as class representatives under Fed. R. Civ. P. 23. *Id.*; JA 68-69.

After extensive discovery, the parties began serious settlement discussions. Arm's length negotiations were conducted for several months. The parties agreed that there was a substantial risk that NYCPD would be unable to defend successfully Examination No. 2548 against the plaintiffs' disparate impact challenge, but that the examination had some psychometric utility and could be used to make promotions so long as care was taken to minimize or eliminate any potentially discriminatory effects. A 84-85.

Under the final terms of the settlement, the Eligible List was to be modified by adding black and Hispanic officers in sufficient numbers, as necessary when selections were made, so that the racial/ethnic composition of the officers promoted from the list would be the same as the racial/ethnic composition of the candidates taking the test. The necessary additional black and Hispanic officers were to be selected and rank-ordered, among themselves, on the basis of their raw scores on the technical knowledge component of Examination No. 2548. JA 71-75.

The *Marino* Complaint

The basic terms of the settlement in *Hispanic Society* were worked out in October and November, 1985. By interim order dated November 27, the court in that case granted NYCPD's request for relief from an earlier order prohibiting promotions based on Examination No. 2548, on the grounds that a settlement had been worked out and NYCPD was then suffering "a severe shortage of sergeants . . . [that] threat[ens] the safety and welfare of the citizens of the City of New York." JA 46-48.

Petitioners, evidently aware of the terms of the proposed *Hispanic Society* settlement agreement, and also aware of the court's interim order permitting additional promotions, filed the *Marino* complaint on December 30, 1985. A 14-29.

The complaint in *Marino* was filed on behalf of several individuals purporting to be nonminority police officers whose test results did not meet the eligibility cut-off. A 14, 19. It alleged that equal protection of the laws required that, if blacks or Hispanics with test scores below the cut-off were to be promoted, then nonminorities with equal or higher test scores should also be promoted. A 19-20, 28-29. The *Marino* complaint thus did not dispute the *Hispanic Society* plaintiffs' entitlement to promotions; on the contrary, the relief sought assumed their entitlement since petitioners sought not to rescind, but to expand, the provisions of the settlement agreement. A 18-20. Nor did the *Marino* complaint allege that Examination No. 2548 or the composition of the original Eligible List in any way denied petitioners equal protection of the laws. Instead, the sole basis for the complaint was the City's decision not to extend to petitioners the relief afforded blacks and Hispanics pursuant to the *Hispanic Society* settlement.

On January 14, 1986 NYCPD requested that the *Marino* case, which had been assigned to Judge Sweet, be reassigned to Judge Carter, before whom *Hispanic Society* was pending. JA 87-91. The City noted that the *Marino* complaint constituted an objection to the terms of the provisionally operative *Hispanic Society* settlement, and that the issues raised by the *Marino* complaint would therefore be identical to those "that [would soon] be evaluated by [Judge Carter] in considering objections to the proposed settlement. . . ." JA 89-90. Petitioners opposed the transfer, insisting that they had no intention of challenging promotions made pursuant to the decree and that their claims to be promoted would have to stand or fall on their own. Letter from Ronald

Podolsky to the Honorable Robert L. Carter, dated January 16, 1986 (attached to Responding Police Officers' Request For Modification, HR 46). The case was transferred.

Following the transfer of *Marino* to Judge Carter, NYCPD moved to dismiss the complaint on two grounds, "for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted." A 30. In support of the latter point, NYCPD argued that the *Marino* "[p]laintiffs, who do not claim to be victims of discrimination by defendants' administration of the promotional examination that is the subject of the *Hispanic Society* litigation, cannot claim a right to the remedy afforded minority candidates who were discriminated against." A 32-33. In support of the jurisdictional point, the City argued that the *Marino* suit was barred as a "collateral attack on the interim orders and the proposed class action settlement in . . . *Hispanic Society*. . . ." A 31. The City continued:

> The proper forum for plaintiffs' complaint is in the form of an objection to the proposed settlement. Defendants therefore respectfully request that this court dismiss the instant action and direct plaintiffs to seek intervention in the *Hispanic Society* litigation, or to file objections to the consent decree once proposed.

A 37. Petitioners opposed the City's Motion, again insisting that their claim for promotions entailed no challenge to the proposed *Hispanic Society* settlement. A 39-56.

Petitioners' "Request For Modification" Of The Consent Decree In *Hispanic Society*

Petitioners accepted the defendants' suggestion that they press their claims in *Hispanic Society*. But they chose not to accept the invitation to intervene.

The final settlement in *Hispanic Society* was conditionally approved on February 7, 1986, and a hearing on the settlement was scheduled for April 17, 1986. JA 49-51. Several filings were made in response to the notice of

hearing by all parties of record, and a "Request For Modification" was filed by petitioners. JA 183-206. In that filing petitioners expressly disavowed any objection to the proposed promotion of blacks and Hispanics not on the original Eligible List. As in their *Marino* complaint, petitioners argued instead that equal protection of the laws required that they too be promoted, and relied, in addition, upon a New York Constitutional provision requiring that civil service promotions be made on a competitive basis. JA 184, 196.

Plaintiffs, defendants and the SBA filed papers in support of the settlement, including affidavits from Mayor Edward I. Koch, New York City Personnel Director Judith A. Levitt, SBA Vice President Joseph V. Toal, three provisional sergeants, and both of plaintiffs' counsel. JA 92-133, 143-82. In addition, plaintiffs' expert filed an affidavit attesting to the statistical significance of the disparate impact flowing from Examination No. 2548, describing some of the technical problems with the examination that had surfaced during discovery, and confirming that the settlement provided a sound means of eliminating the examination's adverse impact without destroying its utility. JA 134-42.

The Hearing On The Settlement

The hearing on the settlement was held as scheduled on April 17, 1986. Appearances were entered by plaintiffs' counsel, counsel for SBA, counsel for NYCPD, and counsel for the Schneider Intervenors. Ronald Podolsky, Marino's counsel, also appeared.

Speaking in support of the settlement on behalf of NYCPD, Judith A. Levitt, Personnel Director for the City of New York and former lead counsel for NYCPD in *Hispanic Society*, described in detail the options that had led to the resolution embodied in the settlement agreement:

> At that time I think that you know that we ha already promoted 500 provisional sergeants who had been serving in the ranks for more than six months.

> There were several options we could have taken. We could have chosen to throw the test out and that would have meant demoting 500 provisionals who already were promoted which would have b[illegible]n extremely disruptive to those sergeants.
>
> We thought—although we couldn't reach the standards that the Second Circuit had set forth—we thought that the test had some validity and should continue to be used if at all possible. The other option was to, rather than just throwing the test out and starting all over again, the other option was to attempt to lower the pass mark to some kind of minimum competency level and then have a lottery among the then passers and see who would be appointed again. That would have caused the demotion of the 500 provisional sergeants then promoted. It would have significantly added to the pool of people and again we would not have gotten the benefit of whatever validity there was to the exam. We would not have been able to use it to rank order and, therefore, appoint the highest scores first.
>
> The third option was the one that was ultimately selected and the one that we are here proposing to the court. It is a settlement which ends up with the promotion of all candidates who originally passed the test in rank order, the promotion of the Blacks and Hispanic candidates who passed the test and then the addition of certain other Blacks and Hispanics in order to meet certain percentages meaning the number [*i.e.*, percentage] of test takers in the pool.
>
> We believe given all of the choices and all of the options, that that was the best solution to an unfortunate set of circumstances. It eliminates the viability of the Title VII challenge and it insures that all those who had been promoted and who scored sufficiently high on the test to be originally on the pass list get promoted and have gotten promoted.
>
> Under the circumstances, we think that it is fair to all the class members and it is fair to all the individuals who took the test.

Tr. 17-18. Counsel for plaintiff Guardians Association spoke in support of certification of the class of black

candidates, pointing out the absence of any objections to the settlement by black officers. Tr. 20-21.

Counsel for intervenor-defendants represented by the SBA supported the settlement and class certification for provisionally promoted sergeants. Tr. 21-25. The SBA concurred in the conclusion that NYCPD would be unlikely to prevail in litigation of a Title VII suit, given the current state of the law. The SBA also agreed with NYCPD that the alternatives to the settlement provisions were unacceptable. *Id.* Counsel for the SBA emphasized that all parties to the settlement negotiations had sought a solution that would assure the promotions of those on the original Eligible List who had been promoted, and who had served in the rank under difficult circumstances for over a year at the time of the settlement hearing. Tr. 23-25.

Mr. Podolsky spoke "in opposition to a motion to dismiss Marino against Ortiz, if it is on today, and also in opposition to the settlement in Hispanic." A 101. Acknowledging that the terms of the *Marino* complaint duplicated petitioners' objection to the *Hispanic Society* consent decree he said: "I have cast all of my papers in this case and in the *Marino* case on the ground that such a procedure violates equal protection of the laws which is a constitutional mandate superior to Title VII." A 102.

As he had in the "Request For Modification," Mr. Podolsky conceded that "the beneficiaries of this stipulation [of settlement] have in fact passed the examination and did in fact deserve to be certified to the Police Commissioner as having done so." *Id.* While he declined to suggest that anyone promoted under the settlement was undeserving of promotion, however, he continued to object to the fact that his clients had not also been promoted.

The Decisions Below In *Hispanic Society*

In its *Hispanic Society* decision dated June 16, 1986, the district court found that the pass rate for blacks was

one-fifth of that for white test takers, and for Hispanics, less than half the rate for whites, and it made a finding of *prima facie* adverse discriminatory impact on these two minority groups. The court concluded that this *prima facie* showing of disparate impact "serves as a sufficient predicate for settlement based on race-conscious remedies," and that the settlement was sufficiently narrowly drawn since it "merely provides a remedy for eliminating this disparate impact." A 97. The court also noted that the proposed settlement had been the product of negotiations participated in by NYCPD, plaintiffs' counsel, and counsel for the SBA and the SEA, and that "participation of these varied interests in the agreement brings a high degree of credibility and validity to the settlement." A 96. In addition to avoiding a lengthy and costly trial, the court found, "since [the settlement] is supported by a representative group of police officers, including the SBA, it is more likely to be accepted with good grace within the police department than a disposition imposed by the court." *Id.*

In finding the settlement reasonable under the circumstances of this litigation, the court also expressly addressed the argument advanced by petitioners, finding it to be devoid of legal merit:

> Some of the objectors allege that they too should benefit by the settlement and be protected since they scored as high or higher than some minority members being selected for promotion pursuant to the settlement. While such personal dissatisfaction with the agreement is understandable, there has been no showing of the test's disparate racial impact on any of the white applicants who object to not being placed on the eligible list. Hence Title VII's requirement of remediation is not brought into play. *Berkman v. City of New York*, 705 F.2d 584, 597 n.15 (2d Cir. 1983). Here the settlement deals merely with correction of the disparate impact of Examination # 2548. Whether the settlement solution is approved or disapproved, those white applicants who did not score high enough to be placed on the eligible list will have

> no viable claim to [be] added to the list and no legal basis for challenging their failure to qualify for promotion.

A 98-99.

Shortly after the issuance of the district court's decision, petitioners moved for reconsideration in light of this Court's decision in *Wygant v. Jackson Board of Educ.*, 106 S. Ct. 1842 (1986). The City, the SBA and the plaintiffs in responding to the Motion all pointed out that petitioners were not parties in *Hispanic Society* and that they had never sought to intervene. Defendants' Memorandum Of Law In Opposition To Motion Of "Responding Officers" And Marino Plaintiffs For Relief From Judgment (no docket entry listed) at 2; Memorandum Of Sergeants' Benevolent Association In Opposition To Responding Police Officers' Motion For Relief Pursuant To Rule 60(b), HR 113, at 2-3; Plaintiff Hispanic Society's et al., Memorandum Of Law In Opposition To The Motion Of Ronald Podolsky Pursuant To Rule 60(b)(6) FRCP, HR 114, at 2. Petitioners' Motion was denied. Memorandum Endorsement on Motion (July 10, 1986).

Petitioners filed an appeal from the district court's ruling. Plaintiffs and the SBA moved the court of appeals for dismissal of the appeal, again pointing out that, since petitioners had never intervened and were not parties, they lacked standing to appeal. Plaintiffs/Appellees' Memorandum Of Law In Support Of Motion To Dismiss the Appeal Of Appellants Wayne Costello et al. at 5 (July 29, 1986); Memorandum Of Law In Support Of Motion For Dismissal And Damages Pursuant To Rule 38 FRAP at 5 (August 18, 1986). The United States Court of Appeals for the Second Circuit, after briefing and argument on the merits, dismissed the appeal from the decision in *Hispanic Society* on the grounds urged by respondents. A 58. The court of appeals further noted that, irrespective of their nonparty status, petitioners had no cognizable interest in the proceeding.

> In this case [petitioners] were not on the original eligible list, they have no right to promotion under state law and they do not allege that the examination discriminated against them. Even if the settlement were invalidated, therefore, they would not be entitled to promotion.

A 68.

The Decisions Below In *Marino*

By order dated August 24, 1986, the district court granted defendants' Motion to Dismiss the *Marino* complaint, citing *Prate v. Freedman*, 430 F.Supp. 1373, 1375 (W.D.N.Y.), *aff'd mem.* 573 F.2d 1294 (2d Cir. 1977), *cert. denied*, 436 U.S. 922 (1978).

The court of appeals affirmed the district court's dismissal of the *Marino* complaint on the grounds that it constituted an impermissible "collateral attack" on the consent judgment and proceedings in the *Hispanic Society* case. The court concluded:

> Appellants' proper course, as in most cases where collateral attacks have been dismissed, would have been to intervene in the lawsuit from which the consent decree issued. *Dennison v. City of Los Angeles*, 658 F.2d at 696; *Black and White Children of the Pontiac School System v. School District*, 464 F.2d 1030. Indeed, appellees suggested precisely this course to appellants. If intervention had been denied, the proper course would have been to appeal that denial, *Burns v. Board of School Comm'rs*, 437 F.2d 1143 (7th Cir. 1971) (*per curiam*). Attempting intervention in *Hispanic Society* was obviously available to appellants when they commenced this action, since the final consent decree in that litigation had not yet issued.

A 12.

SUMMARY OF ARGUMENT

I. The dismissal of the appeal in *Hispanic Society* by the Second Circuit must be affirmed because petitioners are not, and never have been, parties of record in the

case. To be entitled to prosecute an appeal, one must have become a party to the action either by having been named, by being impleaded by one who is already a party, or by intervening.

Despite having argued to the court of appeals that they were parties, petitioners concede in this Court that they have never become parties. They assert, however, that the *Hispanic Society* parties and court should have impleaded them pursuant to Rule 19 of the Federal Rules of Civil Procedure. This argument should be disregarded because it is pressed in this Court for the first time and is inconsistent with the position taken by the petitioners below.

The portion of Rule 19 invoked by petitioners was intended to protect the interests of those already party to a lawsuit, and petitioners thus have no standing to assert error on that ground. Moreover, the portion of Rule 19 that is designed to protect the interests of absent nonparties does not fit the petitioners' situation. If their claim is taken at face value, it is that although they had no right to promotion before the settlement in *Hispanic Society*, the promotions of blacks and Hispanics under the settlement who had test scores less than or equal to those of the petitioners has created a right where none previously existed. If that is the case, petitioners cannot claim that their ability to protect their interests was impaired or impeded by disposition of the case without their having been made parties. While it could be said that their ability to protect their interests was impaired by the fact that they were bound by the judgment in *Hispanic Society*, that impairment was the result of their having actively participated in the litigation by inviting the court to rule on their claims; it was not the product of the failure of the parties and the court to join them under Rule 19.

II. The courts below properly ruled that the suit in *Marino* was barred as an impermissible collateral attack by the petitioners on the *Hispanic Society* consent decree.

While petitioners and members of this Court have correctly noted that in other contexts application of the "collateral attack" doctrine raises substantial unanswered questions, on the facts of this case no such troubles exist. Where, as here, petitioners had notice and an opportunity to assert their claims in the *Hispanic Society* proceedings, and where in any event petitioners can claim no infringement of cognizable liberty or property interests, it cannot be argued that petitioners' due process rights were compromised by the dismissal of their complaint in *Marino*. And while in other settings the "collateral attack" doctrine might seem novel, as applied by the courts below and upon the facts of this case, the rule is firmly rooted in time-honored principles of claim and issue preclusion. Indeed, on these facts, the dismissal of the *Marino* complaint is sustained by two well-established facets of the doctrine of *res judicata*.

III. But even if the Court concludes that petitioners' appeal is not clearly foreclosed by basic rules of joinder, intervention, and preclusion, still deeper flaws are equally fatal to the claims petitioners asserted below and seek here to revive. The affirmative provisions of the *Hispanic Society* consent decree, providing promotions to black and Hispanic police officers disparately affected by Examination No. 2548, are not subject to challenge by petitioners who, having suffered no redressable injury by reason of those promotions, lack standing to attack them.

And to whatever extent petitioners seek not to deny the *Hispanic Society* plaintiffs the promotions due them, but seek instead only to procure like promotions for themselves, their claims fall equally wide of this Court's jurisdiction. Petitioners have not stated and cannot state a claim upon which, under federal law, such relief could be granted. Petitioners' claim for promotions under state law likewise fails, for the reason that the promotions they seek would necessarily destroy a judicial decree the terms of which are dictated by the provisions of Title VII of the Civil Rights Act of 1964. As such, their claim under state law is preempted.

ARGUMENT

I. THE PETITIONERS ARE NOT, AND HAVE NEVER BEEN, PARTIES OF RECORD TO THE *HISPANIC SOCIETY* LITIGATION, AND THE FACT THAT THEY WERE NOT JOINED AS PARTIES UNDER RULE 19 OF THE FEDERAL RULES OF CIVIL PROCEDURE IN NO WAY CURES THEIR LACK OF STANDING TO APPEAL THE DECISION IN THAT CASE.

The Second Circuit correctly concluded that, because petitioners were not parties to *Hispanic Society*, they lacked standing to appeal the district court's decision in that case. Petitioners' argument that they were "necessary parties" to *Hispanic Society* under Fed. R. Civ. P. 19, pressed for the first time in this Court, provides no basis for overturning that decision. As nonparties to the proceedings below, petitioners lack standing to invoke provisions of Rule 19 that are designed to protect the rights of litigants who, unlike petitioners, are proper parties before the court. Petitioners' Rule 19 argument also must fail because they cannot demonstrate that their ability to protect their interests was in any way prejudiced by the fact that the parties in *Hispanic Society* did not join them.

A. The Court Of Appeals Correctly Held That, As Nonparties To The *Hispanic Society* Case, Petitioners Lacked Standing To Appeal.

Despite never having been named as parties of record, never having been joined, and never having sought intervention in *Hispanic Society*, petitioners vigorously maintained in the court of appeals that they had in fact been parties to that litigation. *E.g.*, Appellants' Reply Brief to the Second Circuit at 13 ("The . . . Appellants, defined as parties and as defendants in the [*Hispanic Society*] action and presumably bound in a due process sense did not consent to the order [*i.e.*, the consent decree] presented to the court."). Petitioners' argument was based on the fact that the definitions section of the settlement agreement defined the phrase "New York City defendants," as used in the agreement, to "mean and refer to the City of New York, the New York City Police Department, the New York City Department of Personnel, and all officers, employees or agents, whether elected or appointed. . . ." JA 65-66. This language, petitioners contended, necessarily conferred on them the status of parties to the litigation. Appellants' Reply Brief to the Second Circuit at 1-5.

The court of appeals rejected the argument, holding that the provision on which the petitioners relied defined only the parties to the settlement, not parties to the litigation. A 69. Specifically with regard to the question of whether the definitions provision created in petitioners a right to appeal the judgment of the district court, the Second Circuit held:

> Further, viewed in context, the definition of "New York City defendants" does not make appellants either parties to the settlement or parties defendant in their individual capacities. This provision of the settlement simply binds them to comply with its terms in their official capacities as employees of the defendants, and does not give them standing to raise their current objections to the settlement as violative of their individual rights.

A 70-71.

In this Court, petitioners appear to have abandoned the argument that they were parties of record in *Hispanic Society*, tacitly acquiescing in the Second Circuit's decision in this respect. Indeed, in their brief to this Court, petitioners refer to themselves as "a nonparty stranger to the suit" and "nonparties." Brief Of Petitioners at 21, 28, 36. In any event, it seems that there is no dispute at this point that petitioners were never made parties and never sought to become parties in the Title VII actions brought by plaintiffs.

Since they never became parties of record, petitioners clearly had no standing to prosecute an appeal in *His-*

panic Society. *Auto Workers v. Scofield*, 382 U.S. 205, 208-09 (1965) (*amicus curiae* was not entitled to file petition to review judgment on the merits); *United States ex rel. Louisiana v. Jack*, 244 U.S. 397, 402 (1917); *Ex Parte Leaf Tobacco Board of Trade*, 222 U.S. 578, 581 (1911) ("One who is not a party to a record and judgment is not entitled to appeal therefrom."). In *Ex Parte Cockcroft*, 104 U.S. (14 Otto) 578 (1881), this Court held that one who was not a party and had never asked to be made a party, but who had filed affidavits in the proceeding below, nevertheless had no right to appeal the judgment. Similar facts here compelled the Second Circuit's decision to dismiss petitioners' appeal in *Hispanic Society*.

B. Petitioners' Belated Assertion Of Rule 19 Cannot Overcome Their Failure To Intervene In The Proceedings Before The District Court.

Petitioners press for the first time in this Court the argument that, while they were not parties of record in the *Hispanic Society* case, their interests were such as to make them "necessary parties" within the meaning of Rule 19(a) of the Federal Rules of Civil Procedure. Consequently, petitioners contend, they should have been impleaded by the parties or the court in *Hispanic Society*. This argument must be rejected for several reasons.

1. *This Court should not consider petitioners' Rule 19 argument because petitioners press the argument here for the first time.*

Although petitioners participated in the district court proceedings, they neither raised nor addressed their Rule 19 argument in that forum. Moreover, as has already been discussed, petitioners' position before the court of appeals was that in fact they *had* been parties to the action.[2] Having deprived the courts below of the opportunity to consider the merits of their "necessary party" argument, petitioners now seek to raise it for the first time in this Court. Under well settled precedent, however, petitioners' have waived their opportunity to have this Court consider that argument's merits.

"It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Duignan v. United States*, 274 U.S. 195, 200 (1927); *see also E.E.O.C. v. Federal Labor Relations Auth.*, 106 S.Ct. 1678, 1681 (1986) ("Our normal practice, from which we see no reason to depart on this occasion, is to refrain from addressing issues not raised in the Court of Appeals."); *Miree v. DeKalb County*, 433 U.S. 25, 33-34 (1977) ("The facts that this asserted basis of liability is so obviously an afterthought may be some indication of its merit, but since it was neither pleaded, argued, nor briefed in either the District Court or in the Court of Appeals, we will not consider it.").[3] Inasmuch as the most exceptional thing about peti-

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[2] In response to a motion to dismiss petitioners' appeal filed in the court of appeals by the SBA, petitioners' counsel filed a brief statement requesting that the motion be adjourned or that papers earlier filed by him in response to a similar motion to dismiss by another party be treated as his response to the SBA's motion as well. Petitioners' Reply Brief on Petition for Certiorari at A1-5. But one paragraph of the statement also alluded to the notion that petitioners' rights allegedly had been infringed by the settlement and that "they thereby became NECESSARY parties, and the failure tto [sic] join them would render the settlement void." *Id.* at A4 (emphasis in original). This idea was not further developed, however, and it was not even mentioned in either of petitioners' two briefs to the court of appeals on the merits. Nor did petitioners' counsel ever attempt to reconcile his suggestion that the settlement was somehow void because of the failure to join petitioners, with the position advanced in his briefs that petitioners had been parties in *Hispanic Society* all along.

[3] In Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968), this Court did consider and rule on a Rule 19 joinder question that had not been raised by the parties to the litigation in either the trial court or the court of appeals. That case does not, however, stand for the proposition that Rule 19 questions constitute an exception to the principle that the Supreme Court will refrain from ruling on issues not developed in the lower courts. In *Provident Bank*, the Rule 19 issue had been raised by

tioners' Rule 19 argument is its inconsistency with the position taken by them below, this Court should decline to consider it.

2. *In any event, petitioners cannot invoke the provisions of Rule 19, because they cannot make the necessary showing of prejudice to their own rights.*

Even if petitioners' "necessary party" argument could be considered here, it does nothing to advance petitioners' cause. The particular portion of Rule 19(a) relied on by petitioners in making their argument cannot even be invoked by them. It is designed to protect the interests of litigants who are proper parties before the court, not nonparties such as petitioners. Moreover, as petitioners implicity admit by their failure to allege it, they cannot show the prejudice to their own rights that would be necessary to invoke Rule 19 in their own behalf.

a. *Petitioners lack standing to assert that the district court's failure to join them as parties subjected other litigants before that court to a risk of inconsistent obligations.*

Petitioners assert that they were "necessary parties" to the *Hispanic Society* action by operation of Rule 19(a)(ii). That rule provides, in relevant part:

> A person . . . shall be joined as a party in the action if . . . (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may . . . (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a)(2)(ii). Petitioners assert that the application of this provision to their situation "is clear." Brief of Petitioners at 31.

On its face, however, the provision is designed to accord protection only to those who already are parties to ongoing litigation. That this is so is confirmed by the Advisory Committee's remarks on this portion of the rule: "Clause (2)(ii) recognizes the need for considering whether a *party* may be left, after the adjudication, in a position where a person not joined can subject him to a double or otherwise inconsistent liability." Fed. R. Civ. P. 19(a) advisory committee's note (The Amended Rule/New subdivision (a)) (emphasis added). The provision is thus not concerned with the interests of those, like the petitioners here, who have never become parties.

This Court held in *Warth v. Seldin*, 422 U.S. 490, 499 (1975), that a party must "assert his own legal rights and interests, and cannot rest his claim on the legal rights or interests of third parties." *See also Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970) (party may assert only claims that fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question"). Thus, by well settled legal principles, petitioners have no standing to assert even a clear violation of a provision of Rule 19 that was not designed to protect their own interests.

b. *Petitioners are likewise unable to invoke the provisions of Rule 19 that are designed to protects the rights of nonparties.*

The only provision of Rule 19(a) that by its terms is designed to protect the interests of individuals who are not parties to the litigation is Rule 19(a)(2)(i), which provides, in pertinent part:

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the court of appeals *sua sponte*, and had provided one of two grounds for reversing the decision of the district court. *Id.* at 106-07. Recognizing that "this ruling presented a serious challenge to the scope of the newly amended Rule 19," this Court was compelled to address the issue and to conclude "that the inflexible approach adopted by the Court of Appeals in this case exemplifies the kind of reasoning that the Rule was designed to avoid . . . ." *Id.* at 107.

> A person . . . shall be joined as a party in the action if . . . (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest . . . .

Fed. R. Civ. P. 19(a)(2)(i). But, as petitioners' failure to invoke it suggests, they cannot meet this provision's requirements. In particular, they cannot demonstrate that disposition of the *Hispanic Society* litigation would, as a practical matter, "impair or impede" their ability to protect any interest they might claim in the subject matter of that action.

Having received scores on Examination No. 2548 that were below the cutoff set by the City, petitioners were not on the Eligible List, and they had no right to, or legitimate expectation of, promotions based on their performance on that examination at the time that the *Hispanic Society* litigation commenced. Further, as the Second Circuit found, petitioners have not alleged that Examination No. 2548 discriminated against them. A 68. Taking their claim at face value, then, it is nothing more than an assertion that the promotion of black and Hispanic officers with test scores at or below those of the petitioners pursuant to the settlement and consent decree gave rise in petitioners to a right to promotion that did not exist before the settlement. Whatever may be the legal merit of petitioners' claim, therefore, it owes its very existence to the fact that the *Hispanic Society* case was settled as it was.

Under the circumstances, it cannot be said that petitioners were in such a position that disposition of *Hispanic Society* without their joinder as the parties of record in any way impaired or impeded their ability to protect their interests.[4] Indeed, the disposition of the case actually

[4] It is also at least arguable that petitioners did not "claim[] an interest relating to the subject of the action" within the meaning of Rule 19(a)(2)(i). They had no claim that the examination had been discriminatory with respect to them, and at least until the settlement they had no claim of entitlement to promotion. Nor could petitioners have been concerned that in settling *Hispanic Society* the parties might take away a pre-existing right they had to promotion, because they had no such right. At most, petitioners might have asserted that they had a right to insist that no black or Hispanic officers with test scores equal to or less than those of the petitioners could be given promotions at all because petitioners, by operation of the New York Civil Service Law, were not entitled to them. But from the outset, petitioners have been at some pains to avoid taking that position. *E.g.*, A 23-24 (allegations of *Marino* Complaint); JA 185 ("Responding Police Officers Request For Modification" of settlement in *Hispanic Society*).

benefitted them by giving them an argument for their own promotions where previously they had none.

Moreover, the entry of judgment in *Hispanic Society* did not, of itself, in any way impair petitioners' ability to protect the interest that they claim to have acquired through the promotion of minority officers who had equal or lesser test scores. Had they in fact been the "non-party strangers" to the *Hispanic Society* litigation that they now claim to have been, it is quite possible that they would have been able to argue successfully that they could not be bound by the district court's judgment approving the consent decree.

But the fact is that petitioners were not strangers to the *Hispanic Society* case in any meaningful sense. They filed a "Request for Modification" of the settlement agreement with the court, setting forth all of the essential aspects of the claims in their Complaint in *Marino* and requesting exactly the same relief that they were seeking in *Marino*. Their counsel appeared and was heard by the court in the hearing on the settlement. Thus, petitioners sought and, as the district court's opinion plainly shows (A 98-99), they obtained a ruling in *Hispanic Society* on the very claim that they then had pending in *Marino*. Having done so, they were foreclosed from further asserting that claim in *Marino* or anywhere else.

Precisely this situation, where an individual chooses to participate in an action but foregoes the opportunity to become a party by intervening in the case, was the sort

of circumstance with which Justice Harlan was concerned in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968). That case involved an individual (Dutcher) who had participated as a witness at trial but who had not intervened. Dutcher had testified on the issue of whether the driver of an automobile belonging to Dutcher that had been involved in a fatal accident had been using the vehicle with Dutcher's permission. The trial court entered a judgment for the plaintiffs that incoroprated findings adverse to Dutcher on his legal competence to testify and on the permission issue. The court of appeals reversed on the ground that Dutcher had been an "indispensable party," concluding that the action should have been dismissed.

In reversing the court of appeals, Justice Harlan, writing for the Court, was careful to note that participation in litigation by nonparties such as Dutcher might warrant a conclusion that they were bound by the determination in the proceeding in which they had participated:

> If, as has happened, the three plaintiffs obtain a judgment against the insurance company on the permission issue, Dutcher may still claim that as a nonparty he is not estopped by that judgment from relitigating the issue. At that point it might be argued that Dutcher should be bound by the previous decision because, although technically a nonparty, he had purposely bypassed an adequate opportunity to intervene. We do not now decide whether such an argument would be correct under the circumstances of this case. *If, however, Dutcher is properly foreclosed by his failure to intervene in the present litigation, then the joinder issue considered in the Court of Appeals vanishes, for any rights of Dutcher's have been lost by his own inaction.*

Id. at 114 (emphasis added).[5]

[5] At a point somewhat later in the opinion, Justice Harlan added: "Of course, when Dutcher raises this defense [lack of permission] he may lose, either on the merits of the permission issue or on the ground that the issue is foreclosed by Dutcher's failure to intervene in the present case, but Dutcher will not have been prejudiced by the failure of the District Court here to order him joined." 390 U.S. at 115.

Similarly, the failure of petitioners here to take advantage of the opportunity to intervene in *Hispanic Society*, despite having had their failure to do so pointedly raised by parties to the case at several points both in the district court and in the court of appeals, places them on different footing than nonparties who had no connection with the litigation. To the extent they are bound by the judgment and their interest in pursuing their claim in another setting was foreclosed, that is a consequence of their own inaction, not the failure of the parties and the court to join them under Rule 19 as petitioners now suggest.[6]

Likewise, their inability now to challenge that judgment on appeal is attributable to their own failure to take advantage of the opportunity to seek intervention on any of the several occasions when it was presented to them. Had they done so and had intervention been granted, they would have acquired thereby full party status, and their right to prosecute this appeal would have been beyond question at least on that ground. Had they sought intervention and had it been denied, they would have had the right to appeal the denial. *Auto Workers v. Scofield*, 382 U.S. at 209.

Even if Rule 19 applied to this situation and it could be said that petitioners should have been joined, that would also not confer on them the party of record status that is essential to provide the standing to prosecute an appeal from the *Hispanic Society* judgment. To

[6] *See* Robbins v. Chicago, 71 U.S. (4 Wall.) 657, 674 (1866). ("Persons notified of the pendency of a suit in which they are directly interested must exercise reasonable diligence in protecting their interests, and if instead of doing so they wilfully shut their eyes to the means of knowledge which they know are at hand to enable them to act efficiently, they cannot subsequently be allowed to turn round and evade the consequences which their own conduct and negligence have superinduced.")

become a party, one must have been named in the action, been impleaded by one or more of the original parties, or sought and obtained intervention. None of these events has occurred with respect to petitioners in this case, they are not parties, and their appeal in *Hispanic Society* must be dismissed.

II. THE *MARINO* SUIT WAS PROPERLY DISMISSED AS AN IMPERMISSIBLE COLLATERAL ATTACK UPON THE SETTLEMENT IN *HISPANIC SOCIETY* AND ORDERS IMPLEMENTING IT.

Petitioners appealed the dismissal of *Marino* arguing only that the *Marino* suit was not an impermissible collateral attack. Thus, both before the court of appeals, and again here, petitioners have bottomed their appeal upon broad-based criticisms of the collateral attack doctrine which fail, principally, because they overlook the specific facts of this case. As applied to the facts here presented, the proposition that a collateral attack cannot be permitted is neither novel nor problematic, as the courts below recognized.

A. Due Process Considerations Are Not Implicated Here, Both Because Petitioners Had Notice Of, And Participated In, the *Hispanic Society* Proceedings, And Because Petitioners Can Show No Injury To A Protected Liberty Or Property Interest.

As at least two Justices of this Court have noted, there exist situations in which application of the collateral attack doctrine raises serious questions. Where innocent nonminorities have had no notice of the prior proceedings, for example, and have had no opportunity to defend their interests, due process concerns loom large. *Ashley v. City of Jackson*, 464 U.S. 900 (1983) *denying cert. to Thaggard v. City of Jackson*, 687 F.2d 66 (5th Cir. 1982) (Rehnquist, J., dissenting). But in this case, petitioners had ample notice of the *Hispanic Society* proceedings and fully participated both by written brief, and in person, at the hearing convened for those having

objections to the settlement. In addition, the district court duly considered petitioners' objections and explained its reasons for rejecting them. On these facts, which petitioners' arguments largely ignore, no serious due process problems are threatened. *See Local Number 93 v. City of Cleveland*, 106 S.Ct. 3036, 3079 (1986) ("Here, Local 93 took full advantage of its opportunity to participate in the district court's hearings on the consent decree. It was permitted to air its objections to the reasonableness of the decree and to introduce relevant evidence; the district court carefully considered these objections and explained why it was rejecting them. Accordingly, 'the District Court gave the union all the process that [it] was due.'") (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 400 (1982)); *see also Rosen v. N.L.R.B.*, 735 F.2d 564, 568-69, 571 n.11 (D.C. Cir. 1984).

Petitioners likewise overlook a fact that leads to the conclusion that the requirements of due process do not even apply here. The courts below found that "they have no right to promotion under State law. . . ." A 68 (court of appeals opinion); *see also id.* at 98-99 (district court opinion). Petitioners, who failed to perform well enough on the examination to be eligible for promotion, have no legitimate expectancy or entitlement to being made sergeants until a new examination is duly administered. The dismissal of their claim therefore does not implicate due process, because there is no cognizable liberty or property interest at stake. *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (due process not implicated in employment context unless job seeker has "a legitimate claim of entitlement" to the position sought).

Since the requirements of due process are not applicable, and if applicable, were satisfied, the remaining issue raised by the court of appeals opinion in *Marino* is whether the "collateral attack" doctrine as applied to the facts of this case is consistent with basic principles of claim preclusion. Whether that doctrine, in other fac-

tual settings, might improperly extend or violate those principles is not at issue.

B. The Dismissal Of Petitioners' Claims In *Marino* Is Entirely Consistent With Traditional Notions Underlying Claim And Issue Preclusion.

The collateral attack doctrine as here applied serves the same policies as those that justify claim and issue preclusion elsewhere—avoidance of inconsistent results, promotion of finality in judgments, and the effective resolution of disputes (*see* A 9). The fact that the collateral attack rule, as applied in this case, is subsumed by basic principles of preclusion is apparent when the decision of the court of appeals (affirming the dismissal in *Marino* of claims identical to those resolved adversely to petitioners in *Hispanic Society*) is viewed in light of this Court's recent resolution of the "broader question" underlying the whole of preclusion law: that it is "[no] longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 328 (1979) (quoting *Blonder-Tongue Laboratories, Inc. v. University of Illinois Found.*, 402 U.S. 313, 328-29 (1971)). More particularly, two recognized applications of claim preclusion authorized dismissal of the *Marino* complaint.

First, the dismissal of the *Marino* complaint in this case differs little from a straightforward application of *res judicata*. To be sure, the *Marino* plaintiffs chose not to become parties of record in *Hispanic Society* and thus the "identity of parties" requirement of *res judicata* is, in a formal sense, lacking. But in most other respects petitioners availed themselves of the privileges of a party, since they participated in the proceedings, obtained a hearing, and secured an adjudication of their claims. Had that adjudication been favorable to petitioners they could, and undoubtedly would, have relied upon it in collateral claims brought against the City, notwithstanding petitioners not having been parties of record. Having

thus procured an adjudication of their claims that would have bound respondents had petitioners prevailed, petitioners cannot, by the simple expedient of refusing to intervene and thereby become formal parties of record, retain a license to relitigate those same claims in a separate proceeding in the event they do not prevail.

For these reasons the courts have held that a deliberate refusal to become party of record to a suit (while seeking in other respects the benefits of party status) forecloses subsequent collateral attack. In so holding, the courts have followed this Court's reasoning in *Provident Bank*, 390 U.S. at 114, that an interested participant in a previous lawsuit "might be . . . bound by the previous decision [where], although technically a nonparty, he had purposely bypassed an adequate opportunity to intervene." *See National Wildlife Fed'n v. Gorsuch*, 744 F.2d 963, 969 (3d Cir. 1984) (quoting *Society Hill Civic Ass'n v. Harris*, 632 F.2d 1045, 1052 (3d Cir. 1980) ("An unjustified or unreasonable failure to intervene can serve to bar a later collateral attack. . . ."). The facts here, however, call more strongly for the type of preclusion suggested by Justice Harlan in *Provident Bank* than did the facts in *Provident Bank* itself. In that case, Dutcher, the party arguably barred, had appeared in the prior proceeding only as a witness, and his intervention had never been suggested. In this case petitioners, following their refusal to intervene as had been recommended to them, had argued their case through counsel who thus had secured an adjudication of the very same claims petitioners sought in *Marino* to reassert. *See Safir v. Dole*, 718 F.2d 475, 483 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1206 (1984) (where plaintiffs "sedulously abstain[ed]" from intervening, but did intervene in a related proceeding, "[t]his is enough in law and reason to work a coallteral estoppel.")

That application of the collateral attack doctrine under the facts of this case is consistent with principles of preclusion is further illustrated by the fact that it conforms

to the doctrine of virtual representation, according to which "[t]he Federal courts have repeatedly held a nonparty may be bound by a judgment if one of the parties to the earlier suit is so closely aligned with the nonparty's interests as to be its virtual representative." *Mother's Restaurant, Inc. v. Mama's Pizza, Inc.*, 723 F.2d 1566, 1572-73 (Fed. Cir. 1983), and cases there cited. In this case the situation of the Schneider intervenors was the same as petitioners', and like petitioners, they challenged the terms of the consent decree. *See* A 81, 89-91; *see also* Objections To Proposed Settlement, HR 47; Additional Objections To Proposed Settlement By Intervenor-Defendant Hyman, et al., HR 75. Such identity of interests justifies preclusion of relitigation on the grounds of virtual representation (*see Rosen*, 735 F.2d at 571 n.11; *Society Hill*, 632 F.2d at 1050 n.4, 1053 n.7 (*dicta*)), particularly where, as here, the party to be barred actually and actively participated in the former proceeding,[7] deliberately bypassed opportunities to intervene,[8] and where the circumstances strongly suggest an attempt to "manipulat[e] the courts in order to create two opportunities to prevail upon the same issue. . . ." Note, *Collateral Estoppel of Nonparties*, 87 Harv. L. Rev. 1485, 1502 (1974); *see also Crane v. Commissioner*, 602 F. Supp. 280, 286-88 (D.Me. 1985); *Ashley v. Watt*, 549 F. Supp. at 1047-49; *see generally* 18 L. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4457 at 498-99 (1981 and Supp.).

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[7] *See* Gerrard v. Larsen, 517 F.2d 1127, 1134-35 (8th Cir. 1975) (where nonparty actually participated in prior litigation, it is barred "on principles analogous to privity"); Cotton v. Federal Land Bank, 676 F.2d 1368, 1375 (11th Cir.), *cert. denied*, 459 U.S. 1041 (1982), *reh'g denied*, 459 U.S. 1165, 1189 (1983); Ashley v. Watt, 549 F.Supp. 1044, 1047-49 (D.C. Wis. 1982).

[8] *See* First Alabama Bank v. Parsons Steel, Inc., 747 F.2d 1367, 1378-81 (11th Cir. 1984), *rev'd on other grounds*, 474 U.S. 518 (1986); Ashley v. Watt, 549 F.Supp. at 1047-49; *Robbins*, 71 U.S. (4 Wall.) at 674.

III. PETITIONERS' CLAIMS MUST ALSO FAIL FOR WANT OF STANDING AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

In addition to the grounds principally relied upon by the court of appeals below, two fatal flaws in petitioners' claims fully justified the dismissals below and require their affirmance here. To whatever extent petitioners sought, by their objections in *Hispanic Society* or by their complaint in *Marino*, to attack the promotions provided for in the consent decree, petitioners lacked standing and their claims therefore lie beyond federal court jurisdiction. But to the extent petitioners do *not* seek to impeach the affirmative provisions of the decree and instead seek only to secure like promotions for themselves, petitioners have failed to state, and cannot state, any basis upon which a federal court could grant such relief.

A. Petitioners Lack Standing To Challenge The Consent Decree Because, As Petitioners Concede, Others' Promotions Inflict No Redressable Injury On Them.

Petitioners do not, and cannot, allege that the make-whole relief granted the *Hispanic Society* plaintiffs injures them by altering their past, or present, eligibility for promotion. Because their scores on Examination No. 2548 were below passing, petitioners were and are concededly ineligible for promotion, a fact the consent decree did not alter. Nor do petitioners allege that promotions pursuant to the decree will impair their prospects for promotion in the future. To the contrary, the *Marino* complaint itself emphasizes that "there are currently over four hundred vacancies in the rank with hundreds accruing by retirement, promotion and attrition each year." A 24; *see id.* at 25.

Since petitioners make no claim that the consent decree, by modifying the eligibility of certain blacks and Hispanics, has in any way injured either their present status or their prospects for promotion in the future,

they fail to allege the "specific and perceptible harm," *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 45 n.25 (1976) (quoting *United States v. SCRAP*, 412 U.S. 669, 689 (1973)), necessary to confer standing to challenge the consent decree. *See O'Shea v. Littleton*, 414 U.S. 488, 494 (Standing requires "injury in fact," and "abstract injury is not enough."). The court of appeals so suggested in *Hispanic Society*, observing that petitioners "have no more standing than individuals selected at random from a telephone book" (A 77), and this holding accords with the well-accepted view of the courts that nonminority employees whose status and prospects are unaffected suffer no palpable injury from, and therefore lack standing to challenge, decrees that grant minority employees a remedy for discriminatory treatment. *See, e.g., Doherty v. Rutgers School of Law-Newark*, 651 F.2d 893, 899-902 (3d Cir. 1981); *Donnelly v. Boston College*, 558 F.2d 634 (1st Cir.) (*per curiam*), *cert. denied*, 434 U.S. 987 (1977); *Henson v. University of Arkansas*, 519 F.2d 576 (8th Cir. 1975) (*per curiam*); *DiLeo v. Board of Regents*, 196 Colo. 216, 590 P.2d 486 (1978), *cert. denied*, 441 U.S. 927 (1979); *Howard v. New Jersey Dep't of Civil Serv.*, 667 F.2d 1099, 1101-03 (3d Cir. 1981); *George v. Farmers Elec. Coop., Inc.*, 715 F.2d 175, 178 (5th Cir. 1983); *Selgrath v. City of Philadelphia*, 538 F. Supp. 635 (E.D. Pa. 1982); *Howard v. McLucas*, 597 F. Supp. 1501 (M.D. Ga. 1984), *aff'd in part, vacated in part*, 782 F.2d 956 (11th Cir. 1986); *Poovey v. Edmisten*, 526 F. Supp. 759 (E.D.N.C. 1981). As in all of these cases, petitioners here are not eligible for the promotions granted minorities under the consent decree, and therefore lack standing to challenge those promotions. *See also East Texas Motor Freight Sys. v. Rodriguez*, 431 U.S. 395, 403-04 (1977).

As is shown below, no law entitles petitioners to promotions. This fact, in addition, confirms their lack of standing to challenge the consent decree. The only possible result from such a challenge, should it succeed, would be a partial or complete retraction of the relief granted the

Hispanic Society plaintiffs. But this would do nothing to alleviate petitioners' alleged injury—their nonpromotion. As this court held in *Simon*, for a plaintiff to show standing he must show "an injury to himself *that is likely to be redressed by a favorable decision.* Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation." 426 U.S. at 38-39 (emphasis added) (footnote omitted). As recently stated by the D.C. Circuit: "One of the irreducible Article III minima is that the plaintiff's alleged injury must be likely to be redressed if the requested relief is granted." *Safir*, 718 F.2d at 479 (*per* Scalia, J.). Hence, even if petitioners were allowed (in either the *Hispanic Society* case or the *Marino* case) to pursue their challenge to the decree, and even if that challenge were successful and the decree were vacatd in whole or in part—petitioners would still have no basis for claiming entitlement to promotion. For this reason as well, petitioners lack standing to challenge the decree, which further justifies the dismissal of both the *Marino* complaint and the *Hispanic Society* appeal.

B. The District Court's Dismissal Of The *Marino* Complaint Was Also Required On The Alternate Ground Argued By Respondents And Apparently Conceded By Petitioners Below: That The Complaint Failed To State A Claim Upon Which Relief Could Be Granted.

Throughout this litigation, petitioners have strenuously asserted that they do not seek to challenge the validity of the relief granted in *Hispanic Society*, and that their claim is based on their own entitlement and must stand or fall on its own. *See, e.g.*, A 14-29, 39-57, 101-04; JA 204. Since petitioners are presumably masters of their own claim, it may be fair to inquire whether petitioners' claim constitutes a "collateral attack" after all. But the resolution of this issue will not affect the outcome

here. For if the claim, as petitioners have insisted, is not a collateral attack, the claim is one for which no legal relief can be granted and which must for that reason be dismissed, as the courts below stated.[9]

The Motion to Dismiss that was granted in *Marino* asserted two bases for dismissal: impermissible collateral attack and failure to state a claim on which relief could be granted. As grounds for its dismissal of the *Marino* complaint (A 13), the district court cited *Prate v. Freedman*. Two alternative grounds for dismissal—in addition to the collateral attack doctrine—were relied upon in that case. The fact that the Complaint failed "to state a [federal] claim upon which relief may be granted," was one, and the other was the preemptive effect of the challenged decree, which was "imposed pursuant to Title VII . . . U.S. Const. art. VI, cl. 2." 430 F. Supp. at 1375. In view of the fact that the defendants in *Marino* urged dismissal on the basis of petitioners' failure to state a claim upon which relief could be granted, the district court's citation to *Prate* can fairly be read to have encompassed these two alternative grounds as well. Indeed, the same judge who presided over *Marino*, in dismissing petitioners' claims in *Hispanic Society*, specifically agreed with respondents that petitioners "have

[9] The fact that petitioners have not stated a viable claim for relief may properly be relied on here as a ground for upholding the district court's dismissal of the *Marino* complaint as well as the court of appeals' dismissal of the appeal in *Hispanic Society*. Massachusetts Mut. Life Ins. Co. v. Ludwig, 426 U.S. 479, 480-81 (1976) (*per curiam*) (reaffirming "the 'inveterate and certain' ruling, Morley Constr. Co. v. Maryland Casualty Co., 300 U.S. 185, 191 (1937), of United States v. American Ry. Express Co., 265 U.S. 425, 435 (1924) that 'appellee may . . . urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.'"). *Accord* Hankerson v. North Carolina, 432 U.S. 233, 240 n.6 (1977).

no legal basis for challenging their failure to qualify for promotion" A 99.

Petitioners chose, however, to appeal the dismissal of *Marino* only on the basis of a challenge to the collateral attack doctrine. But the alternative grounds for dismissal are compelling even if the court of appeals misapplied the collateral attack doctrine in upholding the dismissal.

1. *Petitioners have failed to state a federal claim upon which relief could be granted.*

At no time have petitioners articulated a legal theory under which they can sue for promotions without contesting either the propriety of the promotions the federal court granted the *Hispanic Society* plaintiffs or the propriety of the original eligible list. But, as the district court properly found, federal law affords no remedy to nonminorities in the absence of such a challenge. *See Berkman*, 705 F.2d at 597 n.15 (Title VII provides no basis for awarding men the affirmative relief afforded women disparately affected by employment tests); *Patterson v. Newspaper & Mail Deliverers' Union*, 514 F.2d 767, 773 (2d Cir. 1975), *cert. denied*, 427 U.S. 911 (1976) (nonminority "has no right to any of the affirmative relief afforded to the minority groups"); *Kirkland v. New York State Dep't of Correctional Servs.*, 711 F.2d 1117, 1126 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984) ("non-minorities do not have a legally protected interest in the *mere* expectation of appointment[s] which could only be made pursuant to presumptively discriminatory employment practices") (emphasis in original) (citations omitted).

2. *Petitioners' asserted state law claims are preempted.*

Petitioners' state law claim of entitlement to promotion is based on N.Y. Const. Art. 5, § 6, which, petitioners contend, guarantees advancement on a competitive basis. A 49, 104; JA 184, 190, 192-96, 202. Petitioners assert

that the promotions awarded under the *Hispanic Society* decree are noncompetitive.

The viability of such a claim depends on whether the consent decree in *Hispanic Society* furthers the remedial requirements of Title VII. If it does, New York law must yield under the Supremacy Clause and petitioners' claim must fail. *Prate*, 430 F. Supp. at 1375; *see Dothard v. Rawlinson*, 433 U.S. 321, 328-31 (1977) (state employment standards unenforceable if in conflict with Title VII disparate impact principles).

A brief review of the district court's opinion reveals that *Hispanic Society* was a classic *prima facie* disparate impact case and that the remedial consent decree was entirely consistent with this Court's expositions of the requirements of Title VII. For this reason, petitioners' claim that the decree is in conflict with New York law fails to state a claim on which relief may be granted. *See Kirkland*, 711 F.2d at 1132 n.18 ("Because state law must yield to federal law in Title VII cases . . . we need no consider whether the settlement violates state law.").

The district court in *Hispanic Society* carefully examined the fairness and reasonableness of the decree and ensured its compliance with all applicable requirements. A 91-99. The disproportionate impact of the promotional exam established the "manifest imbalance" that justifies race-conscious relief. *United Steelworkers of America v. Weber*, 443 U.S. 193, 197 (1979). Indeed, although the required imbalance "need not be such that it would support a *prima facie* case against the employer . . ." (*Johnson v. Transportation Agency*, 107 S.Ct. 1442, 1452 (1987)), the district court properly concluded that the statistical disparity between minority test takers and those ultimately qualifying for promotion made out "a *prima facie* [case of] adverse impact . . . ." A 97. Thus, the predicate for race-conscious relief was more than adequately laid, since the demonstrated disparity satisfied even the more stringent *prima facie* standard espoused

by Justice O'Connor in *Wygant*, 106 S.Ct. at 1856 (O'Connor, J., concurring), and *Johnson*, 107 S.Ct. at 1461 (O'Connor, J., concurring).

The scope of the decree itself "passes even the more rigorous test—it is narrowly tailored to further the Government's compelling interest in remedying past discrimination." *Local 28 of Sheet Metal Workers v. E.E.O.C.*, 106 S.Ct. 3019, 3053 (1986). Since it will do no more than correct the disparate impact of promotional Examination No. 2548, the consent decree is not only narrowly limited in scope and duration (*See Johnson*, 107 S.Ct. at 1455-56; *Weber*, 443 U.S. at 199) but in fact represents no more than make-whole relief. That the decree did not trammel the rights of those who passed the examination and therefore had any legitimate expectation of promotion cannot be questioned in light of petitioners' stipulation that "all persons who passed the exam in the first instance have been promoted. . . ." Petition for Writ of Certiorari at 4, 13-14, 28; *see also* A 24.

That the consent decree does not unnecessarily trammel the rights of petitioners is clearer still. In *Johnson*, where the complaining party was denied a promotion for which he was (unlike petitioners here) eligible, this Court concluded that, since "petitioner had no absolute entitlement" to the job sought, the "denial of the promotion unsettled no legitimate firmly-rooted expectation . . . [and f]urthermore, while the petitioner in this case was denied a promotion, he retained his employment with the Agency, at the same salary and with the same seniority, and remained eligible for other promotions." 107 S.Ct. at 1455-56; *see also United States v. Paradise*, 107 S.Ct. 1053, 1076 (1987) (little burden imposed where petitioners "remain eligible to compete for available promotions") (Powell, J., concurring). While these observations are equally applicable here, the interference with petitioners' interests, if any, is far less: petitioners here did *not* score high enough on the examination to be deemed eli-

gible, and thus had *no* expectation of promotion, "firmly rooted" or otherwise.

The consent decree clearly implements the requirements of Title VII. Thus, petitioners' claim that their failure to receive promotions violates New York law cannot bear fruit, since their promotions would undo what the consent decree has done and thus reinstitute a violation of federal law.

CONCLUSION

For these reasons, the judgment of the court of appeals should be affirmed in all respects.

Respectfully submitted,

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RESPONDENT'S

BRIEF

No. 86-1415

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EVELYN MARINO, ET AL., PETITIONERS,

—v.—

JUAN U. ORTIZ, ET AL.

WAYNE COSTELLO, ET AL., PETITIONERS,

—v.—

THE NEW YORK CITY POLICE DEPARTMENT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT THE HISPANIC SOCIETY, ET AL.

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BEST AVAILABLE COPY

ISSUES PRESENTED FOR REVIEW

1. Whether petitioners who presented their legal objection to a settlement at a hearing on the settlement and had that claim resolved on the merits can proceed with a separate action presenting that same claim?

2. Whether petitioners have standing to challenge nonaffirmative compliance and make-whole relief to victims of discrimination?

3. Whether petitioners who had no interest in the subject matter of an action and had no legally protected interest at issue in that action are necessary parties to that action under Rule 19 Fed.R.Civ.P.?

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STATEMENT OF THE CASE

Introduction and Summary

The two cases before the Court involve the settlement of Title VII employment discrimination claims by Hispanic and black police officers in regard to promotions to the position of sergeant in the New York City Police Department ("NYPD"). The settlement provided that the NYPD could promote police officers to the position of sergeant only if the disparate impact of the challenged examination was eliminated. (Settlement, JA 52-85).[1] As a result, all those police officers on the existing eligible list were promoted along with additional Hispanic and black police officers added to the list. (A 84-85).[2]

The *Marino* and *Costello* petitioners[3] are individual police officers who were not on the eligible list but had examination scores equal to the scores of those Hispanics and blacks added to the list under the settlement. These petitioners sought to benefit as well from the settlement by arguing that the equal protection clause of the Fourteenth Amendment to the Constitution required that once the Hispanics and blacks are promoted that they too should be added to the eligible list and

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1 Citations to the record on appeal will be as follows: documents in the Appendix to the Petition for Writ of Certiorari shall be cited to by "A" and page number; documents in the Joint Appendix shall be cited to by "JA" and page number; and documents not in the appendices shall be cited by a brief description, HR for the *Hispanic Society* record and GR for the *Guardians Association* record, the document number as found in the listing of the Docket Entries and the page number, if appropriate, e.g. Interim Order, HR 19 at 1. Occasionally, a brief description of the document in the Appendix or Joint Appendix will also be included in the citations to those appendices. There are a number of misspellings and other errors in the appendices; the parts of the record that are quoted in this Brief are set forth without these errors.

2 Since the decisions in the Court of Appeals, as the result of litigation in the New York State courts, over 700 additional police officers were added to the eligible list. Most of these police officers have also been promoted including over half of the petitioners.

3 All the individual *Marino* petitioners are all included among the *Costello* petitioners. Petitioners' Brief at 11.

promoted. (*Marino* Complaint, A 14-29; *Costello* Objections to Settlement, JA 183-206).

The *Costello* petitioners made their equal protection argument at the hearings on the settlement. (A 100-106). They were considered by the District Court and rejected. (A 98-99). Their appeal of the settlement was dismissed as they were not parties to the lawsuit. (A 58-79).

The *Marino* petitioners filed a separate lawsuit against New York City officials and agencies based on the same legal theory. (A 14-29). The *Marino* complaint was dismissed as a collateral attack on the settlement. (A-13). The Court of Appeals affirmed the dismissal. (A 1-13).[4]

The questions presented to this Court are: 1) whether the *Marino* complaint should have been dismissed as a collateral attack on the settlement; 2) whether *Marino* petitioners had standing to file their complaint; and, 3) whether the *Costello* petitioners should have joined as parties pursuant to Rule 19[5] of the Federal Rules of Civil Procedure in the Title VII actions.

Set out below in greater detail are the facts and procedural histories of the two cases before the Court.

Costello v. New York City Police Department

In September of 1984, the Hispanic Society of the New York City Police Department and several Hispanic police officers brought a Title VII, 42 U.S.C. § 2000e et seq., employment discrimination lawsuit against the NYPD and New York City Department of Personnel. (Complaint, JA 22-31). A similar lawsuit was filed by the Guardians Association and several black police officers. (Complaint, JA 11-21). The gravamen of

4 The last two paragraphs of the Opinion have been left out of the Appendix. The decision is reported at 806 F.2d 1144.

5 This last question when set forth in the petition for writ of *certiorari* included a reference to Rule 20 of the Federal Rules of Civil Procedure. However, petitioners have not briefed Rule 20, and respondents are treating it as waived. *Travelers Health Association v. Virginia*, 339 U.S. 643, 651 n.4, 94 L.Ed 1154 (1950).

these complaints was that examination #2548 for sergeant had a disparate impact on minority police officers and was not job related. There were three intervening defendants in each of these lawsuits: 1) the Schneider intervenors, non-minority police officers and non-minority fraternal police officer organizations[6] (Motions to Intervene, HR 4 and GR 3); 2) the Sergeant Benevolent Association ("SBA"), the collective bargaining agent for all sergeants (SBA Motions to Intervene, HR 10, GR 7); and, 3) the Sergeants Eligibles Association, ("SEA"), an ad hoc organization of police officers on the eligible list (SEA Motions to Intervene, HR 18, GR 10). These two lawsuits are hereinafter referred to jointly as the *Hispanic Society* litigation.

Extensive discovery was engaged in by the parties and by the United States Attorney for the Southern District.[7] (JA 121-122). Discovery led to two conclusions: 1) that the examination had a disparate impact; and, 2) that the examination could not be shown to be job related in accordance with Title VII standards. (JA 60-61).[8] Thus, there was a violation of Title VII.[9] These conclusions were shared by all the parties.[10]

6 The Emerald Society (Irish), the Columbia Association (Italian); the Shomrim Society (Jewish), the St. Paul Society (Greek), and the Steuben Society (German). (Motion to Intervene, HR 4).

7 The U.S. Attorney's office was permitted to participate in discovery since it had been involved in a prior settlement regarding an earlier sergeants examination. Under that settlement the U.S. Attorney had some rights to oversight on the challenged examination #2548. *Guardians Association v. Civil Service Commission*, 527 F.Supp. 751, 755 (S.D.N.Y. 1981).

8 *See also*, affidavits of defendants' counsel, JA 144-145, and Mayor Koch, JA 158-159.

9 *See, Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Kirkland v. New York State Correctional Services*, F.2d 1117, 1131 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984).

10 The Schneider intervenors did not participate in the discovery and took no position on these issues. The U.S. Attorney's office also concurred in these conclusions. (JA 158-159).

Settlement discussions ensued. Given that the examination was discriminatory in violation of Title VII, the City defendants were faced with two alternatives.[11] They could have scrapped the examination. This would have resulted in the recision of about 500 provisional promotions to sergeant that had been made already. This alternative would have left the City with only half of its some 2800 sergeant positions filled (A 86) and a long delay before a new examination would be prepared. Or, the City could promote enough police officers to fulfill its needs for sergeants. But it could do so only if the disparate impact of the examination were eliminated by the promotion of sufficient numbers of blacks and Hispanics. This second alternative not only had the benefits of providing the City with sufficient sergeants but it avoided the destruction of the good order and morale of the Police Department that would have resulted from the demotion of 500 provisional sergeants. (Vice President SBA Affidavit, JA 92-106 and Settlement, JA 63). The City chose the second alternative. (Mayor Koch Affidavit, JA 157-164). The City really had no other choice as the first alternative was clearly unacceptable. *Id. and see, Sheet Metal Workers*, 92 L.Ed.2d at 372, 54 U.S.L.W. at 4991.

In November 1985, an Interim Order was agreed to by the parties, except for the Schneider intervenors, that provided for the promotion of all those on the eligible list plus additional Hispanics and blacks to offset the adverse impact of the

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11 This Court described the alternatives as follows:

> [A] district court may find it necessary to order interim hiring or promotional goals pending the development of non-discriminatory hiring or promotion procedures. In these cases, the use of numerical goals provides a compromise between two unacceptable alternatives: an outright ban on hiring or promotions, or continued use of a discriminatory selection procedure.

Sheet Metal Workers v. E.E.O.C., 478 U.S. ____, 92 L.Ed.2d 344, 372, 54 U.S.L.W. 4984, 4991 (1986) (Brennan, J. joined by Marshall, J., Blackmun, J., and Stevens, J., plurality opinion).

examination. (Interim Order, HR 19).[12] When all the language to the settlement had been finalized and all those affected by its terms consulted,[13] the final settlement was entered into on January 23, 1986. (JA 52).

The District Court held hearings on the settlement in April 1986. The settlement was supported by the parties to the settlement. The Schneider intervenors opposed the settlement and argued that the quotas violated the equal protection clause of the Fourteenth Amendment. (Schneider Objections, HR 47). The *Costello* petitioners appeared and also filed written objections. (JA 183-206, A 100-106). They argued that the settlement was acceptable as far as it went, but that it should go further and provide for their promotions. Regardless of the time it took, all the petitioners were to be promoted, delaying if need be a new examination. (JA 205-206).

The District Court Judge interrupted the presentation by petitioners' attorney several times. The Court urged him to tell the Court his specific objections to the settlement. (Transcript of Hearing, HR 110 at 33). When he argued that the Fourteenth Amendment required that his clients be promoted, the Judge told him he was not stating the law and what he said made little sense:

> You are now making an argument, but that's not the law and you are a lawyer. That makes no sense . . . You are

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12 The original cut-off for placement on the eligible list was based on producing a list with 1000 names, the expected need for sergeants. The cut-off was not based on a determination that those not on the list were not qualified. (JA 57-58). Relief is limited to qualified Hispanics and blacks. (JA 70, Paragraph III A of the Settlement). All promotions are subject to Sections 50 and 61 of New York Civil Service Law. *Id.* These provisions provide that the NYPD need only appoint qualified candidates and can pass over or reject those not qualified. Moreover, because promotions of anyone, beyond the 1000 contemplated by the settlement, including minorities is at the discretion of the NYPD, the NYPD can stop making promotions when it believes there are no more qualified minorities. *See*, JA 70.

13 *See, e.g.*, Affidavit of Vice President of SBA, JA 92; Affidavits of SBA members, Sheilds JA 165, Pulaski JA 172; and, Goodstein Affidavit JA 107.

> now making an argument that's contrary to the rules of law that govern decisions under Title VII. And I can't deal with that. You are expressing a personal opinion. I can't deal with that. I have to deal with what I understand the law to be . . .

A 105.[14]

The District Court approved the settlement. It found it fair and adequate and consistent with Title VII and the United States Constitution. (A 97-98). The Court rejected the *Costello* petitioners' argument holding:

> Some of the objectors allege that they too should benefit by the settlement and be protected since they scored as high or higher than some minority members being selected for promotion pursuant to the settlement. While such personal dissatisfaction with the agreement is understandable, there has been no showing of the test's disparate racial impact on any of the white applicants who object to not being placed on the eligible list. Hence Title VII's requirement of remediation is not brought into play. *Berkman v. City of New York*, 705 F.2d 584, 597 n.15 (2d Cir. 1983). Here the settlement deals merely with correction of the disparate impact of Examination #2548. Whether the settlement solution is approved or disapproved, those white applicants who did not score high enough to be placed on the eligible list will have no viable claim to [be] added to the list and no legal basis for challenging their failure to qualify for promotion.

A 98-99.

The *Costello* petitioners moved for reconsideration of the District Court's decision in light of this Court's opinion in *Wygant v. Jackson Board of Education*, 476 U.S. ____, 90 L.Ed.2d. 260, 54 U.S.L.W. 4479 (1986). (Motion, HR 108 and

14 Soon after the hearing, the District Court ruled on a motion to dismiss the *Marino* complaint which presented the same unfounded claim. The Court dismissed the complaint. (A 13).

HR 109). That motion was denied. (Memorandum Endorsement on HR 108 and 109, July 10, 1986).

The *Costello* petitioners[15] appealed the entry of the settlement. The Court of Appeals dismissed their appeal as they were neither parties below nor sought to intervene. (A 58-79).

The Court of Appeals rejected the three arguments that the *Costello* petitioners raised to support their standing to appeal. First, the Court found that they were not named parties or intervenors. (A 66-67). Moreover, the Court held that petitioners did not even have an "interest" in the *Hispanic Society* litigation:

> In this case, appellants were not on the original eligible list, they have no right to promotion under state law, and they do not allege that the examination discriminated against them. Even if the settlement were invalidated, therefore, they would not be entitled to promotion. Accordingly, they cannot appeal from the settlement as nonparties with an interest in the order below.

A 68. Second, the Court rejected petitioners' contention that they were parties below because the settlement defined the City defendants to include all its employees in their official capacities. (A 69-70). Third, the Court held that the filing of objections at the settlement hearing did not give petitioners a right to appeal. (A 74). In conclusion, the Second Circuit stated:

> Appellants' predicament results from their steadfast refusal to comply with the requirements for intervention set forth in Fed. R. Civ. P. 24.

A 75.

Marino v. Ortiz

After the entry of the Interim Order in the *Hispanic Society* litigation (HR 19), which resulted in the promotion of several

15 The Schneider intervenors also appealed but later withdrew their appeal. (A 65).

Hispanics and blacks not previously on the eligible list, the *Marino* petitioner filed a complaint against the City of New York and its officials and agencies. (A 14-29). The complaint did not mention the race of the petitioners nor the race of those who had been promoted nor even the Interim Order. It simply alleged that "some" persons had been promoted with examination scores like the petitioners. (A 14-29). It was claimed that the equal protection clause of the Fourteenth Amendment required that all those with scores equal to those that were promoted had to be added to the eligible list and all of them promoted irrespective of any time limitation. (A 28-29). The case was assigned to the District Court Judge who was presiding over the *Hispanic Society* litigation.

The City moved to dismiss the complaint for failure to state a claim for relief and as a collateral attack on the settlement in *Hispanic Society*. (A 30). Their moving papers suggested that *Marino* petitioners intervene in Hispanic Society. (A 37).

Marino petitioners responded to the motion by requesting summary judgment. (A 39). They claimed that the complaint did not allege racial discrimination and that they only wanted to be promoted since they had scores similar to those already promoted. (A 48-49).[16] They argued that it was not a collateral attack as they were not seeking to have anyone denied a promotion.[17] Their argument was simply that the Fourteenth Amendment required that they be promoted.

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16 On appeal to the Court of Appeals, petitioners also maintained that they were not alleging "reverse discrimination." Appellants' Brief at 2, *Marino* v. *Ortiz*, Docket #86-7347, 2d Cir. Now, for the first time, petitioners claim racial discrimination. See e.g., Petitioners' Brief at 15, 28, etc.

17 Indeed, under the logic of petitioners' argument all 12,000 who took the examination would be promoted. Under the terms of the settlement the NYPD can promote only by continuing to offset the disparate impact. (JA 70). Thus, if petitioners are promoted, additional minorities must also be promoted. This, in turn, will create a new group of persons like petitioners who have scores equal to some of the minorities promoted. This could continue until essentially everyone was promoted.

As stated above, the petitioners had argued this same position at the hearings on the settlement in *Hispanic Society*. The District Court adhered to the position it stated at those hearings, that petitioners' argument was nonsense. In a Memorandum Endorsement the District Court dismissed the complaint citing *Prate v. Freedman*, 430 F.Supp. 1373, 1375 (W.D.N.Y.), *aff'd mem.*, 573 F.2d 1294 (2d Cir. 1977), *cert. denied*, 436 U.S. 922 (1978). (A 13). *Prate* was a very similar lawsuit which was dismissed as an improper collateral attack on a settlement and for the failure to state a claim for relief under the Fourteenth Amendment.

The Court of Appeals affirmed the dismissal of the *Marino*. It held that the complaint was an improper collateral attack on the *Hispanic Society* settlement. The Court also held that since petitioners had actually presented their claims at the settlement hearing in *Hispanic Society*, and the District Court had considered and rejected those claims, petitioners were barred from relitigating the issue in Marino. 806 F.2d at 1147.[18]

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18 This part of the Opinion was not included in the Appendix. The Court of Appeals stated:

> Not only did appellants have notice of the proceedings in *Hispanic Society* and a suggestion to intervene therein, but they actually presented their claims at the objector hearing in that case. Judge Carter considered appellants' claims, and found them to be without merit. Thus appellants had the opportunity to engage in the original lawsuit and actually presented their claims. As we have said in an analogous context, "[t]he efficient and fair administration of justice requires that litigation of an issue at some point come to an end. And for the appellant, who has had one opportunity already to contest the . . . order, the time to relitigate that issue has necessarily run." *Class* v. *Norton*, 505 F.2d 123, 125 (2d Cir. 1974).

806 F.2d at 1147.

SUMMARY OF ARGUMENT

POINT I

The Court should decide this case and not some hypothetical case based on different facts. The Court need not decide whether a party can be denied his day in court by failing to intervene in another prior action. Petitioners here had their day in court at the settlement hearing in *Hispanic Society*, and were, thus, properly precluded from having a second day in court in *Marino*. Petitioners' failure to intervene in *Hispanic Society* merely barred their ability to appeal a decision on the merits of their claim. Their failure to intervene, however, did not bar them from having their day in court.

Due process requires only that a party be given an opportunity to state his claim and have it resolved. The hearing on the settlement provided petitioners with that due process opportunity. They took advantage of it. If a nonparty can be barred from bringing a new lawsuit based on his participation through a surrogate in a prior case, clearly petitioners who themselves appeared and litigated their claim can be barred from proceeding in another lawsuit.

However, if the Court reaches the issue of whether petitioners' claim in *Marino* should be barred because they failed to intervene in *Hispanic Society*, it should find that under the circumstances the complaint was properly dismissed. Where there is notice and an opportunity to be heard, as there was here, petitioners failure to intervene properly bars their collateral attack.

At issue are the due process rights of petitioners to their day in court and the jurisprudential interest in having settlements finally and conclusively resolve the claims of all interested persons. The process that is due depends on the weighing of several factors: (1) the interest of petitioners; (2) the due process protections against error that would be provided at a settlement hearing as opposed to those available in a separate lawsuit; and, (3) the interest in the courts in hearing the matter

fully resolved at a hearing on a settlement. *Matthews v. Eldridge*, 424 U.S. 319 (1976). A weighing of these factors weighs heavily in favor of precluding petitioners' collateral lawsuit and requiring them to intervene in *Hispanic Society* to have their claim resolved.

The interest of petitioners is very limited, if existing at all. Petitioners are only interested in the relief provided in the settlement and how they can benefit from it. They were not interested in the merits of the *Hispanic Society* litigation. They made no claim of racial discrimination. Their only claim is that the Fourteenth Amendment requires that they be promoted because others with similar examination scores were promoted.

There are no additional due process safeguards against error that would be provided at a hearing on a collateral attack that there were not available at the hearing on the settlement. Since petitioners' interest is in the relief provided by the settlement, that interest is completely satisfied, as petitioners conceded, by the hearing on the settlement. Due process requires an opportunity to state a legal claim and present evidence if necessary. The settlement hearing provided that opportunity.

There is a strong jurisprudential interest in finality. By resolving all accrued claims about the relief at the hearing on a settlement, the courts minimize the possibility of further litigation and the possibility of inconsistent results. Almost every court that has addressed the issue has found that collateral attacks are properly barred.

Petitioners' complaint was properly dismissed because they already had their claims considered and resolved at the settlement hearing. Petitioners should not be permitted to relitigate that claim in a separate lawsuit.

Alternatively, the *Marino* complaint was an improper collateral attack on the settlement. Petitioners failed to intervene in *Hispanic Society*; they cannot bring a separate action seeking to assert the same claims that they could have raised through intervention.

POINT II

The *Marino* complaint was properly dismissed because of petitioners' lack of standing. The relief provided in *Hispanic Society* was only compliance and make-whole relief to the victims of discrimination. The impact of such relief on nonvictims is no bar to such relief. *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976). Thus, petitioners and other nondiscriminatees have no standing to complain about such relief.

Affirmative relief is different. Nondiscriminatees have an interest in seeing that affirmative race conscious relief does not trammel on their interest. Affirmative relief is provided to nonvictims of discrimination. It may provide for promotions or hirings at rates higher than simply avoiding disparate impact.

Here, the relief only goes to the victims of discrimination and only to avoid disparate impact. Under the circumstances, it was the only relief that could be provided. It was not affirmative relief and, thus, petitioners lack standing to challenge it.

POINT III

Costello petitioners were not necessary parties to the *Hispanic Society* litigation. First, petitioners failed to preserve the issue for appeal. Second, Rule 19 Fed.R.Civ.P. provides that a necessary party must have an "interest relating to the subject of the action." Petitioners' interest was not in the subject of the action, the discrimination of the challenged examination. Their interest was only in the relief. See, Rule 20 Fed.R.Civ.P. Interest in the relief alone is not sufficient to make petitioners a necessary party. Third, petitioners need a legally protected interest to be necessary parties under Rule 19, and they have no such interest. Petitioners are not necessary parties.

ARGUMENT

POINT I

THE *MARINO* COMPLAINT WAS CORRECTLY DISMISSED AS AN IMPROPER COLLATERAL ATTACK

The *Marino* petitioners presented their claims at the objector hearing in *Hispanic Society*. Their claims were considered and found to be without merit. They were properly bound by that determination. As this Court has stated:

> Those who are accorded an opportunity to be heard in a judicial proceeding established for determining the extent of their rights are properly bound by its outcome, either because they chose not to contest the . . . claim or because they chose to do so and lost.

McKinney v. Alabama, 424 U.S. 669, 676, 47 L.Ed.2d 387 (1976); and *see*, *Adams v. Morton*, 581 F.2d 1314, 1318 (9th Cir. 1978), *cert. denied sub nom. Gros Ventre Tribe v. U.S.*, 440 U.S. 958 (1979).

The District Court in *Hispanic Society* held a hearing to determine the lawfulness and, because of the race conscious provisions, the reasonableness of the settlement.[19] At that hearing the Court heard the objections of the Schneider intervenors as well as those of petitioners. Both raised concerns under the equal protection clause of the Fourteenth Amendment. The Court considered these objections and ruled on them. (A 97-99). It found the settlement lawful. *Id.* That

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19 The District Court was required to do so. *Kirkland v. New York State Department of Correctional Services*, 711 F.2d 1117, 1129 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984). And now all courts must do the same. *Firefighters v. Cleveland*, 478 U.S. _____, 92 L.Ed.2d 405, 54 U.S.L.W. 5005 (1986) and *see especially*, 92 L.Ed.2d at 429, 54 U.S.L.W. at 5013. (O'Connor, J. concurring) ("[A] court should not approve a consent decree that on its face provides for racially preferential treatment that would clearly violate § 703 [of Title VII] or the Fourteenth Amendment.").

hearing and that determination were all the process that petitioners were due.[20]

The petitioners were not formal parties to the *Hispanic Society* litigation because they failed to intervene. That failure, despite many suggestions that they do so, merely denied petitioners the right to appeal.[21] The failure to intervene, however, did not affect the adequacy of the hearing that petitioners were provided on their claims. Even intervening nonminority employees and their unions have no more rights to challenge the legality of the settlement than were provided to petitioners. They had their concerns heard and resolved; they cannot block the settlement.[22]

Having had their due process hearing on their claim, petitioners were properly precluded from proceeding with their complaint in *Marino*.[23]

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20 *Firefighters*, 92 L.Ed.2d at 428, 54 U.S.L.W. at 5012; *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 400, 71 L.Ed.2d 234 (1982). Petitioners below essentially conceded that they were satisfied by the hearing they received. In their brief in *Marino v. Ortiz* in the Court of Appeals, *Marino* petitioners stated that because of their interest in the settlement, "there was a compelling need to substantively consider [their] claims. . ." They went on to say, "This, in fact, was done in *Hispanic* [*Society*]." They concluded that if they are found to be parties in *Hispanic Society*, they would not pursue their appeal in *Marino* to reinstate their complaint. Appellants' Brief, *Marino v. Ortiz*, at last 2 unnumbered pages, apparently pages 7 and 8, Docket # 86-7347, 2d Cir.

21 *United States ex. rel. Louisiana v. Jack*, 244 U.S. 397, 402 (1917). Any number of procedural failures can lead to the denial of the right to appeal. *See. e.g.*, Rules 4 and 31 of the Federal Rules of Appellate Procedure.

22 *Firefighters*, 92 L.Ed.2d at 428, 54 U.S.L.W. at 5012; *Kirkland*, 711 F.2d at 1126.

23 The claim presented in *Marino* was the same one presented and resolved at the hearing on the settlement. Thus, both doctrines of preclusion, *res judicata* and collateral estoppel, apply. *Montana v. United States*, 440 U.S. 147, 153 (1979). Unlike the United States in *Montana*, petitioners actually appeared in both actions, and, thus presented the same claim for relief. *Id.* 440 U.S. at 154.

> A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies. . ." *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-49, 42 L.Ed. 355, 18 S.Ct. 18 (1897).

Montana v. United States, 440 U.S. 146, 153 (1979). There is no dispute that the claim put in issue and resolved in *Hispanic Society* is the same claim raised in *Marino*. And there is no dispute that the *Costello* petitioners and the *Marino* petitioners are the same parties. Therefore, the *Marino* complaint was properly dismissed as an improper[24] collateral attack. The principal reasons for preclusion were properly served here:

> To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

Montana, 440 U.S. at 153-154 [footnote omitted].

This Court has barred lawsuits by others who were not formally parties in a prior litigation where their surrogates have represented their interests. *Montana*; *Souffront v. La Compagnie Des Sucreries*, 217 U.S. 475, 54 L.Ed 846 (1910).[25]

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24 *See generally*, 1B *Moore's Federal Practice* ¶ 0.405[4.-1] (1984 ed.) for a discussion of the bases for proper collateral attacks. Collateral attacks are ordinarily limited to situations where the prior judgment is not valid, where it is "void, i.e. a judicial nullity." *Id.* at 196.

25 *See also*, 1B *Moore's Federal Practice* ¶ 0.411[6] at 444 (1984 ed.):

> [I]f a non-party who thus participates in litigation has an interest sufficiently close to the matter in litigation, and has adequate opportunity to litigate in support of or in defense against the cause of action on which the suit is based, the policies underlying the

Here the exact same party was involved in both lawsuits, preclusion is clearly appropriate.

In addition, although this Court need not reach the issue, the failure of petitioners to intervene in the *Hispanic Society* litigation serves as a bar to their pursuing a separate lawsuit.[26]

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doctrine of judicial finality require that the participating non-party should be bound by the resulting judgment to the same extent as though he were a party to the action.

26 Collateral attacks on judgments entered in employment discrimination cases have been dismissed where the party filing the collateral attack failed to intervene or failed to intervene in a timely fashion in the prior case: *Thaggard v. City of Jackson*, 687 F.2d 66 (5th Cir. 1982), *cert. denied sub nom., Ashley v. City of Jackson*, 464 U.S. 900 (1983); *Dennison v. City of Los Angeles Department of Water and Power*, 658 F.2d 694 (9th Cir. 1981); *Prate v. Freedman*, 430 F. Supp. 1373 (W.D.N.Y.), *aff'd.*, 573 F.2d 1294 (2d Cir. 1977), *cert. denied*, 436 U.S. 922 (1978); *O'Burn v. Shapp*, 70 F.R.D. 549 (E.D. Pa. 1976), *aff'd mem sub nom. Lutz v. Shapp*, 546 F.2d 417 (3d Cir. 1976), *cert. denied*, 430 U.S. 968 (1977). These decisions have been cited approvingly in *dicta* by other courts: *Grann v. City of Madison*, 738 F.2d 786, 796 (7th Cir.), *cert. denied*, 469 U.S. 918 (1984); *Stotts v. Memphis Fire Dept.*, 679 F.2d 541 (6th Cir. 1982), *rev'd on other grounds sub nom. Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Culbreath v. Dukakis*, 630 F.2d 15, 22 (1st Cir. 1980); *see contra, United States v. Jefferson County*, 720 F.2d 1511, 1518 (11th Cir. 1983). *Cf. Corley v. Jackson Police Department*, 755 F.2d 1207, 1210 (5th Cir. 1985) (*dicta* questioning 5th Circuit's *Thaggard* rule).

In other types of litigation, courts including this Court have dismissed claims based on the failure to intervene: *Penn Central and N&W Inclusion Cases*, 389 U.S. 486, 505-506 (1968); *Mitchell v. City of Los Angeles*, 753 F.2d 86 (9th Cir. 1985); *National Wildlife Federation v. Gorsuch*, 744 F.2d 963 (3d Cir. 1984); *Safir v. Dole*, 718 F.2d 475, 483 (D.C. Cir. 1983) (Scalia, J.), *cert. denied*, 467 U.S. 1206 (1984); *Society Hill Civic Association v. Harris*, 632 F.2d 1045 (3d Cir. 1980) and see, *Black and White Children of Pontiac School System v. School District of the City of Pontiac*, 464 F.2d 1030 (6th Cir. 1972). Other courts in *dicta* have rejected this reasoning: *Consumers Union of United States v. Consumer Product Safety Commission*, 590 F.2d 1209, 1222 (D.C. Cir. 1978), *rev'd sub nom. GTE Sylvania, Inc. v. Consumers Union, Inc.*, 455 U.S.375 (1980).

In all the cases cited above except *Thaggard*, the parties who were barred from bringing collateral actions, had an accrued interest in the

In *Hispanic Society*, the District Court necessarily had to decide and did decide whether the settlement unnecessarily trammeled the interests of non-minorities and therefore was unlawful under the Title VII and the Fourteenth Amendment.[27] Thus, the claims of petitioners under the Fourteenth Amendment concerning the impact of the settlement on them would be considered and resolved. Petitioners were certainly aware of the hearing. Moreover, petitioners were told to intervene in *Hispanic Society*. (A 37). Yet, petitioners steadfastly refused to intervene, either before the settlement hearings, or at the hearings or even after judgment or on appeal.[28] (A 75). As this Court stated in *McKinney*, those who chose not to take advantage of "an opportunity to be heard in a judicial proceeding established for determining the extent of their rights are properly bound by its outcome." *Id.*, 424 U.S. at 676.[29]

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prior litigation and a timely opportunity to intervene in that action. Thus, with the exception of plaintiffs in *Thaggard*, no one was barred from bringing a separate collateral attack who did not have an opportunity to participate in the main action.

27 *Kirkland*, 711 F.2d at 1129.

28 After the decision approving the settlement, the petitioners moved for reconsideration in light of this Court's decision in *Wygant*. (Motion, HR 108 and 109). That motion was opposed on, among other grounds, the basis that petitioners had not intervened and, therefore, had no standing to make the motion. (Plaintiffs' Memo in Opposition, HR 112). Yet, petitioners still took no action to intervene. *See, United Airlines, Inc. v. McDonald*, 432 U.S. 385, 53 L.Ed.2d 423 (1977) (postjudgment intervention upheld).

Even after motions were made to dismiss the appeal, petitioners took no action to intervene. *See, Bryant v. Yellen*, 447 U.S. 352, 366, 65 L.Ed.2d 184 (1980) (invention in Court of Appeals upheld).

29 In *McKinney*, the petitioner had no notice of a civil proceeding to determine whether a certain magazine was obscene. The Court held that he therefore could not be bound by that determination in a subsequent criminal proceeding. The Court, however, stated that with notice, petitioner may have been bound. *McKinney*, 424 U.S. at 676-677.

Here, petitioners had actual notice of the prior proceedings, and while they appeared, they failed to intervene.

It is important to recognize the narrowness of the position developed in this brief and needed to decide this case. In any case of preclusion, there is always a balancing between the rights of a party to his day in court, his due process rights, and the jurisprudential interests in finality, consistency, and judicial economy.[30] Where a party has his day in court or the opportunity to have his day, his rights to due process are satisfied, and the interests of finality bar a second day in court. This is so even if there is reason to believe that the decision rendered was wrong. *See, e.g. Federated Department Stores Inc. v. Moitie*, 452 U.S. 394, 69 L.Ed.2d 103 (1981).

Part of that balancing process is determining what process is due. *See Brown v. Felsen*, 442 U.S. 127, 60 L.Ed.2d 767 (1979). The factors to be considered are: 1) what is the interest of petitioners; 2) what risk of error is there if those interests are considered and resolved at a hearing on a settlement versus in a collateral lawsuit; and 3) what is the interest of the courts in having the matter conclusively resolved in one hearing on the settlement versus potential multiple hearings brought on by collateral attacks. *See Matthews v. Eldridge*, 424 U.S. 319, 335, 47 L.Ed.2d 18 (1976).

Here, the interest of petitioners is very limited, if they have any interest at all. See, Point II, *infra*. Their interest arose only because they believed that they could benefit from the settlement. They had no interest in the merits of the *Hispanic Society* litigation because whether plaintiffs or defendants prevailed would not have changed their status as not being on the eligible list.[31]

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30 The same can be said for other jurisdictional dismissals based on judicial discretion. *Colorado River Water Conservation District v. U.S.*, 424 U.S. 800, 47 L.Ed.2d 483 (1976); *Arizona v. California*, 460 U.S. 605, 75 L.Ed.2d 318 (1983).

31 Perhaps the simplest measure of this lack of interest is to consider what party status would appropriately fit petitioners if they had sought intervention before the settlement—intervenor-plaintiffs or intervenor-defendants. Would they file a complaint or an answer as part of their motion. Rule 24(c) Federal Rules of Civil Procedure.

The settlement hearing would and did provide petitioners with an adequate hearing on their claim.[32] There would be no additional due process elements that would have attached to their collateral lawsuit. The question to be resolved was solely a legal one—whether the equal protection clause required that petitioners be promoted as well under the settlement. Even if there were factual issues, settlement hearings can and have provided for presentation of evidence. The notice of the hearings, herein, provided that objectors could present evidence. (HR 20, Appendix A at 8). In this case, all the parties including the objecting Schneider intervenors submitted affidavits. (HR 47, 75, 91, 94-103).

There was more than adequate notice of the settlement hearings. As with most settlements, notice of the hearings was sent to all those on the eligible list and was posted in all the precincts. (JA 84; Settlement, HR 20, Appendix A).[33] Not only did petitioners appear and file papers,[34] but almost 70 other individual police officers not on the eligible list also filed objections. (Letters to the Court, HR 20-25, 27-45, 48-74, 76-90, 92). A collateral attack proceeding would provide no additional notice and may even provide less. Notice of any hearings in a collateral lawsuit would ordinarily go only to the parties. Many others who are similarly situated to those bringing the collateral attack would have no notice.

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32 *See*, footnote 20, *supra*.

33 This "notice [was] reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L.Ed. 865 (1950). Those with concrete interests and those on the eligible lists were sent notice of the hearings on the settlement. Others, like petitioners, were also provided notice through the posting of notice in police precincts. Under the circumstances and given the differing interests of those potentially affected, it was reasonably calculated to provide actual notice. *Id.*

34 Because petitioners actually appeared, there can be no claim of a due process violation. *See National Equipment Rental v. Szuknent*, 375 U.S. 311, 11 L.Ed.2d 354 (1964).

Finally, the interest in the courts in finality and judicial economy is great. Almost every court that has addressed the question has recognized the benefit of barring collateral attacks. (See cases cited above in footnote 26). They have all expressed the problems of entertaining a never ending stream of such actions. By requiring those with an interest in a settlement to appear at one hearing, the courts can finally dispose of the matter.[35]

A weighing of the above factors weighs strongly in favor of requiring petitioners, and others like them who oppose the entry of a settlement of a Title VII claim, to intervene and appear at the hearings on the settlement. Those like petitioners who appear and have their claims considered are properly bound. With proper notice, as there was here, those who fail to appear or to intervene are also properly bound. The hearing on a settlement provides an adequate due process opportunity to

35 Since petitioners' interest in the settlement had accrued before the entry of the final settlement, the Court need not address the rights of persons whose interest has not yet accrued. *See e.g., Ashley v. City of Jackson*, 464 U.S. 900 (1983) (Rehnquist, J. joined by Brennan, J. dissenting from the denial of *certiorari*.) However regardless of whether the interest in the settlement accrued after the entry of the settlement, any claim for relief based on a settlement should be raised in a timely motion to intervene and not in a separate lawsuit. That intervention can and should properly be limited to issues that had not been previously resolved. *Howard v. McLucas*, 782 F.2d 956 (11th Cir. 1986); *Kirkland*, 711 F.2d at 1125-1128. But even if separate collateral attacks on judgments are permitted for those whose interest accrued after a settlement was entered, those challenging the settlement should be bound by res judicata to the extent that others similarly siutated have raised and litigated the same claims. *Los Angeles Unified School District v. Los Angeles Branch of NAACP*, 714 F.2d 935, 942-945 (9th Cir. 1983); *Bronson v. Board of Education*, 525 F.2d 344, 349 (6th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976). To do otherwise would require an employer and the beneficiaries of the settlement to defend an endless number of lawsuits by each employee who was impacted by affirmative race conscious relief. *See, id.* This, of course, would not bar such challenges altogether. To the extent there has been a change in the law or in the circumstances, and the injunctive terms of the settlement are still in force, anyone can make a timely motion to intervene combined with a Rule 60(b)(5) Fed. R. Civ. P. motion for relief from the judgment.

present objections to the terms of a settlement. There are no additional due process safeguards that are available in a collateral attack. The jurisprudential interests in finality and the avoidance of a multiplicity of litigation with the potential for conflicting results clearly outweighs any interest in having objector's claims heard in separate lawsuits.

The choice presented in this case is between a hearing on a settlement or hearings in collateral lawsuits. Due process requires that there be an adequate opportunity to be heard for those who object to the terms of a settlement. It does not require that that opportunity be provided in a collateral lawsuit. The courts have and should require that those objections be presented at the hearing on the settlement. Petitioners were provided that opportunity, and their claim was considered and rejected. The Court of Appeals properly barred another lawsuit raising that same claim.

This Court need not reach the broader issue of whether the *Marino* complaint should have been dismissed because petitioners failed to intervene in *Hispanic Society*. However, if it does so, such a dismissal was the proper exercise of discretion and consistent with due process. The interests of finality outweigh any interest of petitioners to have their claim considered separately from the hearing provided on the settlement.

POINT II

ALTERNATIVELY *MARINO* SHOULD BE AFFIRMED BECAUSE PETITIONERS LACK STANDING

Marino petitioners lacked standing[36] to file their complaint. The provision of nonaffirmative compliance and make-whole relief in a Title VII lawsuit creates no interest in that relief by nonbeneficiaries. Such relief merely ends the discriminatory practice and restores the victim of discrimination to the position he or she would have been in absent discrimination.

The normal elements of this non-affirmative relief include hiring or promotion or reinstatement with back pay and back seniority. *Ablemarle Paper Co. v. Moody*, 422 U.S. 405, 45 L.Ed.2d 280 (1975); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 47 L.Ed.2d 444 (1976).[37] The relief provided in this case is merely compliance and make-whole relief.[38] *Berkman v. City of New York*, 705 F.2d 584, 595-596 (2d Cir. 1983). While race conscious, it is not affirmative. It provides a remedy only to those who are victims of the discrimination, those who were adversely affected by the challenged examination, and ends when a new examination is given. *Id.*

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36 Although the *Marino* petitioners' lack of standing was raised in opposition to the petition for *certiorari*, it was not raised in the Court of Appeals. Nevertheless, this Court should consider this jurisdictional issue. *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 209, 10 L.Ed.2d 297 (1963).

37 The courts have uniformly not required that any nonvictim be bumped or lose his or her job in order to provide relief to a discriminatee. *Firefighters v. Stotts*, 467 U.S. 561, 579 n.11, 81 L.Ed.2d 483 (1984).

38 Compliance relief is provided by requiring the NYPD to eliminate the adverse impact of discriminatory examination if it wants to promote any police officers. Only the victims of the discrimination, those adversely affected, are benefitted. (JA 70).

Make-whole relief in the form of back seniority and partial back pay is provided to those Hispanics and blacks who would have been promoted sooner but for the discrimination. (JA 76-79).

Make-whole relief should not be denied except "for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination . . . and making persons whole for injuries suffered through past discrimination." *Ablemarle*, 420 U.S. at 421; *Franks*, 424 U.S. at 747. The impact of such relief on those employees who were not the victims of the discrimination is not a reason for denying make-whole relief. *Franks*, 424 U.S. at 774-775. Therefore, nonbeneficiaries like petitioners have no standing to challenge the relief provided in the settlement.

Affirmative relief, on the other hand, does not merely end the discriminatory practices. *Sheet Metal Workers*, 92 L.Ed.2d at 370, 54 U.S.L.W. at 4991. It provides relief to nonvictims of discrimination. *Id.* 92 L.Ed.2d at 368-369, 54 U.S.L.W. at 4990. Moreover, the race conscious hiring or promotion ratios are not tied to a nondisparate-impact percentage, but can exceed that percentage to reach some desired goal. *United States v. Paradise*, 480 U.S. ____, 94 L.Ed.2d 203, 55 U.S.L.W. 4211 (1987). Affirmative relief is awarded to provide effective relief against a recalcitrant employer or union who has a history of long standing and egregious discrimination and to eliminate the lingering effects of pervasive discrimination. *Sheet Metal Workers*, 92 L.Ed 2d at 369, 52 U.S.L.W. at 4991.

Where affirmative race conscious relief is ordered, nonminorities have standing to insure that the relief does not unnecessarily trammel on their interests. *Firefighters*, 92 L.Ed.2d at 428, 54 U.S.L.W. at 5013; *Kirkland*, 711 F.2d at 1128. However, no affirmative relief was awarded here.

For example, if a court determined that an individual Puerto Rican was not hired for reasons of race and ethnicity, the court would require that the Puerto Rican be hired with back pay and back seniority. A white who had been hired in the interim, between the denial of employment to the Puerto Rican and the court ordered relief, would have no standing to challenge that relief, on grounds of "reverse" discrimination, either through a

separate lawsuit or through attempted intervention in the discrimination case.[39] *See Freeze v. Aro, Inc.*, 503 F.Supp. 1045 (E.D. Tenn. 1980). The impact of such relief on the white's seniority could be no bar to the provision of that relief. *Franks*. Therefore, he would have no standing to complain.

The absence of standing is even clearer in this case than it would be in most cases challenging make-whole and compliance relief. Those challenging race conscious relief are usually non-minorities who have some forseeable expectation of employment or promotion because they are on a list to be appointed or promoted.[40] They ordinarily assert some claim of racial discrimination. Here, petitioners were not on the eligible list for promotion. They had no expectation of promotion. Their only expectation was a false one, that somehow they could benefit in the same way as the victims of discrimination.[41] They asserted no claim of racial discrimination. Both the District Court and the Court of Appeals found that they lacked any cognizable interest. (A 98-99, A 68).

Petitioners here have no standing to challenge the nonaffirmative relief provided in this case. The relief simply provides for the elimination of the adverse impact of the challenged examination. It is not affirmative relief and thus cannot unnecessarily trammel on the interests of nonbeneficiaries. Other than to promote no one from the discriminatory examination, it was the only available relief. *Sheet Metal Workers*, 92 L.Ed.2d at 372, 54 U.S.L.W. at 4991. The settlement could neither benefit nor harm petitioners' chances of promotion from the challenged examination.

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39 If there was a settlement leading to this result, those non-minorities affected by the seniority may have standing to challenge the relief as collusive or entered into merely as a pretext for discrimination. *See, E.E.O.C. v. McCall Printing Corp.*, 633 F.2d 1232 (6th Cir. 1980)

40 *See, e.g., Paradise; Kirkland; Thaggard.*

41 Relief of that type has been consistently rejected. *See, Berkman*, 705 F.2d at 597 n.15; *Patterson v. Newspaper and Mail Delivers' Union*, 514 F.2d 767, 772-773 (2d Cir. 1975) *cert. denied*, 427 U.S. 911 (1976); *Rios v. Enterprise Association of Steamfitters*, 520 F.2d 352, 356 (2d Cir. 1975).

Petitioners lacked standing to file their complaint, and the complaint should properly have been dismissed for lack of jurisdiction. *Warth v. Seldin*, 422 U.S. 490, 45 L.Ed.2d 343 (1975). This Court should affirm the dismissal of the *Marino* complaint on jurisdictional grounds without reaching the issue presented.

POINT III

COSTELLO PETITIONERS ARE NOT NECESSARY PARTIES UNDER RULE 19 FED. R. CIV. P.

The issue of whether *Costello* petitioners were necessary parties under Rule 19 of the Federal Rules of Civil Procedure was not preserved for appeal by petitioners.[42] It was neither raised by petitioners nor ruled on by the Court of Appeals.[43]

Respondents argued in the Court of Appeals that *Costello* petitioners had no standing to appeal. *Costello* petitioners raised several arguments in response but did not raise the Rule 19 issue. The Court of Appeals dismissed the appeal without addressing Rule 19 since it had not been raised by petitioners.[44] It has not been the practice of this Court to decide issues that

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42 *Costello* petitioners also renew arguments that were raised in the Court of Appeals. However, the only question presented in the petition for *certiorari* was whether petitioners were necessary parties under Rule 19 Fed. R. Civ. P.

43 Respondents' brief in opposition to *certiorari* pointed this out to the Court. (Joint Brief in Opposition at 12 n.4).

44 Petitioners did claim to be "necessary parties" in response to motions to dismiss their appeal. However, these motions were denied without prejudice to renew the arguments before the panel that heard the appeal. (JA 8, entry for August 28, 1988). As stated above, when standing was raised again in the briefs on appeal, petitioners did not rely on Rule 19.

have not been raised or considered below.[45] *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2, 26 L.Ed.2d 142 (1970). There is no reason for an exception in this case.[46]

Moreover, considerations relevant to Rule 19 make it particularly inappropriate for it to be addressed for the first time by an appellate court. The ordinary procedure for joinder questions is to have them raised by the parties or by the District Court. Here the issue is sought to be raised by a nonparty for the first time in this Court. *Costello* petitioners knew about the *Hispanic Society* litigation. If they believed that they had an interest sufficient under Rule 19 to have them joined as a party, they should have intervened or raised the issue in the District Court. Petitioners should stand in the same position as a losing defendant who fails to raise Rule 19 joinder; they should be barred from raising it on appeal. *See*, *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 110 (1968); *Kirkland v. New York Department of Correctional Services*, 520 F.2d 420, 424 (2d Cir.1975), *cert. denied*, 429 U.S. 823 (1976).

However, even if this Court considers the issue, the contention of petitioners is without merit. *Costello* petitioners had no interest in the claims or defenses of the parties to *Hispanic Society*. As discussed fully in Point II, petitioners only sought to assert an interest when relief was provided. At that point, petitioners claimed that they should benefit from that relief. Petitioners' interest in the relief provided to plaintiffs is not one encompassed by Rule 19.

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45 The issue should not be addressed at all where none of the parties have appealed and the appeal has been filed by an unsuccessful applicant for intervention. *Moots v. Commonwealth of Pennsylvania*, 495 F.2d 1095, 1096 n.3 (3d Cir.), *cert. denied. sub nom. Churchill Area School District v. Moots*, 419 U.S. 884 (1974).

46 The failure to join an indispensable party is not a jurisdictional defect. *Elmendorf v. Taylor*, 10 Wheat (23 U.S.) 152, 6 L.Ed. 289 (1825); *see*, Wright, Miller & Lane, 7 *Federal Practice and Procedure* § 1611 (1986 ed.)

Petitioners point to section (a)(2)(ii) of Rule 19 as the provision covering their interest. (Petitioners' Brief at 20). That section provides:

> (a) PERSONS TO BE JOINED IF FEASIBLE. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if . . . (2) he claims an *interest relating to the subject of the action* and is so situated that the disposition of the action in his absence may . . . leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Rule 19 Federal Rules of Civil Procedure [Emphasis added]. As the emphasized portion states, a person must claim an "interest relating to the subject of the action." In contrast Rule 20 of the Federal Rules of Civil Procedure provides for the permissive joinder as plaintiffs or defendants of persons with an interest in the "relief demanded."[47] Petitioners have no interest in the "subject of the action," whether the challenged sergeants examination discriminated against Hispanic and black police officers in violation of Title VII. *See*, *Rios v. Enterprise Association of Steamfitters*, 520 F.2d 352, 357 (2d

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47 Rule 20 Fed. R. Civ. P. provides in relevant part:

> (a) PERMISSIVE JOINDER. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

Cir. 1975).[48] Their claimed interest is only in the "relief" provided in *Hispanic Society*. Thus, while they may be subject to permissive joinder as plaintiffs or defendants, they are not necessary parties.

Finally, petitioners need a "legally protected interest" to be a necessary party under Rule 19. *See* 3A *Moore's Federal Practice* ¶ 19.07[2.-0] at 19-19 (1987 ed.).[49] Even if petitioners were on the eligible list, they would have no legally protected right to promotion.[50] As persons not on the eligible list, they clearly have no legally protected interest.[51]

Petitioners are not necessary parties under Rule 19.

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48 Even nonminorities on existing eligible lists lack sufficient interest to be necessary parties under Rule 19. *Kirkland v. New York State Department of Correction*, 520 F.2d 420 (2d Cir. 1975); *cert. denied*, 429 U.S. 823 (1976); *Jackson v. Sargent*, 394 F.Supp. 162, 173 (D.Mass), *aff'd on other grounds*, 526 F.2d 64 (1st Cir. 1975). Nor do their unions have to be joined. *Culbreath v. Dukakis*, 630 F.2d 15, 24 n.14 (1st Cir. 1980); *Hibbler v. Birmingham Bankhead Highway, Inc.*, 496 F.2d 1171 (5th Cir. 1974); and *see*, *National Licorice Co. v. N.L.R.B.*, 309 U.S. 350, 84 L.Ed. 799 (1940);

49 *Northern Alaska Environmental Center v. Model*, 803 F.2d 466, 468 (9th Cir. 1986); *Boggs v. Darr*, 103 F.R.D 526 (D. Kan. 1984); *Special Jet Services, Inc. v. Federal Insurance Co.*, 83 F.R.D. 596 (W.D. Pa.1979), *rev'd on other grounds*, 643 F.2d 977 (3d Cir. 1981).

50 *Cassidy v. Municipal Civil Service Commission*, 37 N.Y.2d 526, 529 (1975).

51 The interest needed to be a necessary party under Rule 19 is not the same as the interest needed to intervene under Rule 24. *Smuck v. Hobson*, 408 F.2d 175, 178 (D.C. Cir. 1969). Thus, petitioners may have had sufficient interest to intervene, but see Point II, *supra*.

CONCLUSION

This Court should affirm the decisions below.

Dated: August 21, 1987

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RESPONDENT'S

BRIEF

No. 86-1415

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EVELYN MARINO, *et al.*,

Petitioners,

v.

JUAN U. ORTIZ, *et al.*,

Respondents.

and

WAYNE COSTELLO, *et al.*,

Petitioners,

v.

THE NEW YORK CITY POLICE DEPARTMENT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Whether persons interested in Title VII litigation who have notice of the litigation and are advised to move to intervene but choose instead to appear as objectors may bring a collateral attack on the proposed consent decree?

2. Whether a nonparty may appeal from a consent decree?

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No. 86-1415

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EVELYN MARINO, *et al.*,

Petitioners,

v.

JUAN U. ORTIZ, *et al.*,

Respondents.

and

WAYNE COSTELLO, *et al.*,

Petitioners,

v.

THE NEW YORK CITY POLICE DEPARTMENT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR NEW YORK CITY RESPONDENTS

Statement of the Case

(1)

In June 1983, the New York City Police Department ("the Police Department") offered a promotional examination for the rank of sergeant (A60).[1] 11,899 police officers

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[1] "A" references are to the Appendix to the Petition for a Writ of Certiorari. "JA" references are to the Joint Appendix. "HR" references are to the *Hispanic Society* District Court docket number.

took the examination (*id.*) After scoring the examination, the New York City Department of Personnel set a cut-off score to create an eligible list large enough to fill 1,000 of the available sergeant's positions (*id.*).

The examination had a disparate impact on black and Hispanic test takers (A97). Approximately 79% of the test takers were white, 12.3% were black and 8.7% were Hispanic (A60). The percentage of test takers scoring above the cut-off point was significantly lower for blacks (1.69%) and Hispanics (4.39%) than for whites (10.61%) (A84). The eligible list for promotion to sergeant was 93.47% white, 2.30% black and 4.23% Hispanic (A83). This disparity in pass rates would make out a prima facie Title VII case under *Castaneda* v. *Partida*, 430 U.S. 482, 496 n. 17 (1977).

The Hispanic Society plaintiffs and Guardians Association plaintiffs instituted Title VII actions in September and November 1984 alleging that the promotional examination and resulting eligible list were racially discriminatory (A60-61). The actions were consolidated (A63-64) and will be referred to as "*Hispanic Society*". Three groups intervened in the lawsuits: individuals and white ethnic societies of the Police Department as representatives of their members who were on the eligible list (the "Schneider intervenors");[2] the Sergeants Eligibles Association ("SEA") representing persons on the eligible list; and the Sergeants Benevolent Association ("SBA") represent-

[2] The societies are the Emerald Society, the Columbia Association, the Shomrim Society, the St. Paul Society and the Steuben Society (HR 47, Schneider Objections filed 3/31/86). The United States mistakenly describes the Schneider group as representing the membership of the white ethnic societies who had not been placed on the eligible list (Brief at 3).

ing officers who had been provisionally promoted to sergeant off the eligible list (A61-62).[3]

After extensive discovery, analyzing the records and conferring with the test developers, New York City ("the City") officials developed serious doubts about whether they could satisfy the Second Circuit standards for test validation, *see, e.g., Guardians Ass'n of New York City* v. *Civil Service Commission*, 630 F.2d 79 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981), and thus successfully defend the lawsuit (JA144). The United States Attorney's Office for the Southern District of New York, which had intervened in similar cases in the past, said that in its opinion the examination was indefensible (JA158-59). An independent testing expert also reviewed the examination and conferred with the test developer and the New York City Department of Personnel. The independent expert had serious concerns about the City's ability to prove the test met Title VII standards (JA145). The City therefore entered into settlement negotiations, although it had had no intention to discriminate.

As the defendants explained in their affidavits supporting the settlement, two other considerations were of crucial importance to the City. The Police Department was suffering from a severe shortage of supervisors and needed to be able to appoint new sergeants immediately (JA160). The City was unwilling to risk losing the case at trial and then having to operate the Police Department with over half of all sergeant positions vacant (*id.*). Due to normal

[3] After the lawsuits were instituted, the defendants agreed not to make any permanent promotions using the challenged eligible list. However, because the Police Department was suffering from a severe shortage of supervisory personnel, the District Court issued interim orders in December 1984 allowing the provisional promotion of 534 persons on the eligible list. This group was 94.8% white, 1.37% black and 3.9% Hispanic (A84).

agreed the examination had "some psychometric utility" (JA62). Retroactive seniority would be given to the sergeants who had been promoted pursuant to Judge Carter's interim orders and to the minority officers who would have been promoted then if the settlement had been in effect (JA78-79). These minority officers would also receive back pay (JA76). Once a new examination is given, and a new eligible list established, the quotas would expire (JA70).

Although Mayor Koch opposed racial quotas, he approved this settlement as the "least undesirable alternative for resolving an otherwise insurmountable problem" (JA163-64). The Mayor, Police and Personnel Departments accepted the settlement because it provided an immediate solution to the shortage of sergeants and it did not hurt morale by requiring the demotion or displacement of any officer who was on the eligible list and therefore had an expectation of promotion (JA147-48).

When the outlines of the settlement had been worked out, the parties agreed to a new interim order in November 1985 (A84-85). 366 people were provisionally promoted to sergeant at this time (*id.*). The group included all the officers on the eligible list who had not yet been promoted [5]

(footnote continued from previous page)

be used to rank order the black and Hispanic candidates because the video had been defective in some test locations and only some candidates were given an April 1984 make-up video test (JA 150).

[5] Because of successful state court challenges to some of the examination questions, the examination was later rescored and, in January 1987, over 700 people were added to the eligible list. Most of these police officers have since been promoted to sergeant. Approximately one third of petitioners have been promoted under this procedure.

attrition, the shortage would have continued to grow until it would cause a serious threat to public safety (JA148, 160). The City could not afford to wait to make appointments until a new test was developed.

The City was also determined to avoid the serious morale problems that would have developed if legitimate expectations of promotion were frustrated. The City did not want to risk losing at trial and then having to demote the sergeants who had already been provisionally promoted from the eligible list (JA159). If the City lost, the demoted sergeants and the officers who had not been promoted but were on the eligible list would have had to compete once again for promotion to sergeant (JA147, 159). As Mayor Koch informed the District Court (JA159-60): "This would have seriously undermined morale and disrupted the orderly career progression necessary for the Police Department to attract and keep dedicated and qualified supervisors."

The plaintiffs, defendants, SEA and SBA eventually reached an agreement that satisfied the City's concerns. The settlement provided that at least 1,000 police officers on the eligible list would be promoted to sergeant (JA70). In addition, black and Hispanic officers not on the list would be promoted to sergeant so that the percentage of blacks and Hispanics promoted would be approximately equivalent to the percentage of blacks and Hispanics taking the test (JA71-75).

The agreement provided that black and Hispanic candidates would be promoted in rank order within their ethnic group based on their scores on the technical knowledge portion of the examination (*id.*).[4] The parties had

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[4] The examination consisted of a written technical knowledge test and a video job sample test (A79). The entire test could not

(footnote continued on following page)

and 100 black and 60 Hispanic officers who were not on the list, promoted in rank order on the basis of their test scores, to remedy the disparate racial impact of the exam (*id.*).

(2)

Petitioners in *Marino* instituted their action after the interim order was filed on November 27, 1985, but before the Court approved the consent decree (A7). Petitioners alleged they had taken the sergeant's examination but did not score high enough to be placed on the eligible list and were not promoted as part of the racial quotas (A7). They alleged they scored equal to or higher than the lowest scoring minority officer promoted pursuant to the *Hispanic Society* interim order (*id.*). The complaint alleges, in part, that the failure to promote petitioners, while black or Hispanic officers who were not on the eligible list were promoted, violates petitioners' right to equal protection (A7-8).

For relief, petitioners asked that they be placed on the eligible list and eventually promoted to sergeant (A8). Petitioners sought an injunction against administering a new test until the eligible list is exhausted (A29). They also asked for back pay, seniority and attorney's fees (*id.*).[6]

Defendants moved to dismiss the complaint on the ground that it was a collateral attack on the proposed *Hispanic Society* settlement and that it failed to state a claim (A31; District Court Memorandum of Law in Support of the Motion to Dismiss, "Memorandum", at 4-5). Defendants argued that plaintiffs should instead intervene in the *Hispanic Society* litigation or file objections to the proposed settlement (A37). The District Court dismissed the *Marino* complaint as an impermissible collateral attack on the consent decree on April 24, 1986 (A13).

[6] Petitioners have apparently abandoned their claim for back pay and seniority. Brief at 36-37, 38-39; Appellants' Brief in the Court of Appeals at 17, 21; Reply Brief in the Court of Appeals at 4, 6-8. The abandonment of those claims may moot out the appeal of approximately one third of petitioners who have been promoted to sergeant.

After the *Marino* complaint was filed, the Court scheduled a hearing on the proposed *Hispanic Society* settlement (A6-7). Notice of the proposed settlement and of the April 17, 1986 hearing date was sent to all plaintiffs and intervenors and posted in all precincts of the New York City Police Department (JA84). The Schneider intervenors, who had not signed the settlement, filed objections and appeared at the hearing (A64). They argued that the settlement should be disapproved because it constituted racial discrimination (HR 47, Schneider Objections filed 3/31/86).

Petitioners also filed objections and appeared at the hearing (A64-65). They argued that the proposed settlement violated their right to equal protection because they were not being promoted while minority officers who had received scores equal to or lower than theirs were promoted (*id.*). They asked that the consent decree provide that they too be promoted (A98). Petitioners did not argue that they should have been joined as parties, nor did they move to intervene in the litigation.

The District Court approved the settlement in June 1986 after finding that the examination had a prima facie disparate impact on black and Hispanic test takers (A97, 99). The Court considered and rejected petitioners' argument. Because petitioners had not demonstrated that the examination had a disparate impact on white test takers, there was no ground to grant them relief under Title VII

(A98). The Court rejected petitioners' equal protection argument (A99):

> Whether the settlement solution is approved or disapproved, those white applicants who did not score high enough to be placed on the eligible list will have no viable claim to [be] added to the list and no legal basis for challenging their failure to qualify for promotion.

(3)

The Schneider intervenors filed an appeal from the entry of the consent decree but eventually withdrew their appeal (HR 117, Notice of Appeal; Stipulation Withdrawing Appeal). Petitioners also appealed the entry of the consent decree.

Defendants moved to dismiss the appeal arguing that petitioners lacked standing because they were not parties to the record. Petitioners argued in response that they were included within the definition of defendant [7] in the settlement agreement and therefore were parties (Typed Opposing Affirmation at 3-7). Petitioners also argued that they were necessary parties to the *Hispanic Society* litigation rendering the settlement void (Handwritten Opposing Affirmation at 2-3). The Second Circuit motions panel

[7] The Stipulation of Settlement provides (JA65-66):

> D. *New York City defendants.* The "New York City defendants" shall mean and refer to the City of New York, the New York City Police Department, the New York City Department of Personnel, and all officers, employees or agents, whether elected or appointed, of the City of New York, but not including the *Hispanic Society* plaintiffs, the *Guardian Association* plaintiffs, the intervenor-defendants or any individual or groups represented by the *Hispanic Society* plaintiffs, the *Guardian Association* plaintiffs, or intervenor-defendants.

denied the motion without prejudice to renew before the panel hearing the appeal (Order filed August 27, 1986).

In their brief on the merits petitioners again argued that the Equal Protection Clause required their promotion to sergeant because they had scored equal to or higher than minority officers who had been promoted (Appellants' Brief at 8-21). Petitioners also argued that they were parties because of the settlement's definition of "defendant" (Reply Brief at 1-17). Petitioners did not argue that they should have been joined as necessary parties to the *Hispanic Society* litigation.

The appellees argued in response that petitioners' appeal should be dismissed because they were not parties. The appellees also argued that approval of the consent decree was not an abuse of discretion (*e.g.*, Defendants-Appellees' Brief at 10-20).

(4)

The Court of Appeals for the Second Circuit unanimously dismissed the appeal.[8] The Court held, relying on *United States ex rel. Louisiana* v. *Jack*, 244 U.S. 397 (1917), that because petitioners never intervened and were not parties, they could not appeal the District Court judgment. The Court noted that many of the petitioners had become involved in the case for the first time on appeal; while approximately 350 appellants were named, "a considerably smaller number" had objected to the settlement (A77).

Relying on *Bender* v. *Williamsport Area School District*, 475 U.S. 534, 106 S. Ct. 1326 (1986), the Court found petitioners' failure to intervene fatal because petitioners had made no factual record (A76-77):

[8] The opinion is reported at 806 F.2d 1147.

> The present appeal . . . is based on factual assertions that are nowhere set forth in sworn pleading. . . . Because the requirements for intervention as a party have been ignored, the people pursuing this appeal have no more standing than individuals selected at random from a telephone book. . . .

The Court saw no reason to overlook the lack of a factual record (A77):

> Other individual police officers and white ethnic societies . . . intervened as parties and vigorously pursued their interests. We perceive no reason why appellants could not have done the same.

The Court of Appeals heard the *Marino* appeal at the same time as the *Hispanic Society* appeal. The Court unanimously affirmed the dismissal of the *Marino* complaint. The Court found that the "salutory policies" behind the rule barring collateral attacks on Title VII consent decrees were "squarely implicated" by the lawsuit (A8-9). The Court held that the relief requested "would destroy the settlement by recreating the adverse racial impact that brought on the *Hispanic Society* litigation. . . ." *Marino* v. *Ortiz*, 806 F.2d 1144, 1147 (2d Cir. 1986).[9] Further, the Court found that if the *Marino* action had gone forward, the settlement would have collapsed; no settlement could be reached if it did not prevent further litigation (A10-11). The Court also found that the *Marino* action undermined the concept of final judgment and invited conflicting results (A11).

The Court ruled that petitioners should have intervened in the *Hispanic Society* litigation (A12). The Court found

[9] The last two paragraphs of the Second Circuit opinion in *Marino* were omitted from Petitioners' Appendix.

that petitioners had been advised to intervene in *Hispanic Society* and that such a motion could have been timely (A12):

> Attempting intervention in *Hispanic Society* was obviously available to appellants when they commenced this action, since the final consent decree in that litigation had not yet issued.

The Court noted that even if intervention had been denied, petitioners' proper course would have been to appeal the denial, not to mount a collateral attack (A132). Finally, the Court stated:

> Not only did appellants have notice of the proceedings in *Hispanic Society* and a suggestion to intervene therein, but they actually presented their claims at the objector hearing in that case.

Marino, supra, 806 F.2d at 1147. In these circumstances, the Court found that petitioners' time to "relitigate" the issue "has necessarily run" *Id.*

Summary of Argument

(1)

Petitioners were properly barred from collaterally attacking this Title VII consent decree because they deliberately chose not to intervene in the Title VII litigation. The rule against collateral attacks prevents inconsistent judgments, allows settlement of Title VII cases and protects final judgments.

The need for the rule is apparent in this case. The relief petitioners seek, their promotion, is inconsistent with the consent decree because it would recreate the disparate racial impact of the examination, which the consent decree

was intended to redress. No settlement would be possible if petitioners were ordered promoted because under their theory almost every officer who sat for the examination would have to be promoted. Moreover, if the parties are subject to unpredictable collateral attacks, the Congressional policy favoring voluntary settlement of Title VII claims would be impeded. Finally, application of the rule barring collateral attacks protects this final judgment and allows the litigation over the exam to come to a close.

The necessity for the rule barring collateral attacks has been recognized by all the Circuits to consider the issue but one. The Eleventh Circuit has rejected the rule to the extent it denies nonparties their day in court. But in this case application of the rule did not deny petitioners their day in court.

Petitioners deliberately chose not to intervene when, as the Court below stated, "[a]ttempting intervention in *Hispanic Society* was obviously available to appellants" (A12). Petitioners knew of their claim before entry of the consent decree, they were aware of the *Hispanic Society* litigation, they were advised to intervene and warned that if they did not intervene their claim would be barred as a collateral attack. In the face of these warnings, petitioners chose to present their objections without intervening. In these circumstances, petitioners may not bring a second lawsuit attacking the consent decree. Under the rule suggested in *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 114 (1968), and developed in *National Wildlife Federation* v. *Gorsuch*, 744 F.2d 963 (3d Cir. 1984), petitioners have to accept the consequences of the path they charted.

Petitioners have not been passed over for a promotion they were entitled to. If there had been no Title VII liti-

gation, petitioners would not have been promoted and the consent decree does not alter their status. Further, there will be no quotas governing future examinations or eligible lists. For these reasons, petitioners cannot claim "an interest relating to the subject of the action" and are not necessary parties under Fed. R. Civ. P. 19(a).

All majority employees with an interest in the promotional examination voluntarily became parties in *Hispanic Society*. Petitioners made their own choice not to become parties after being invited to intervene and warned that their claim would otherwise be precluded. Application of the rule barring collateral attacks to petitioners who had notice of the litigation and were aware of their claim in time to intervene, serves the need for finality, consistent judgments and encouragement of Title VII settlements.

(2)

Petitioners could not appeal from the consent decree because they were not parties to the record. This Court's decision in *Bender* v. *Williamsport Area School District*, 475 U.S. 534 (1986) establishes that if a nonparty does not intervene and establish a factual record describing its status and injury, the Court lacks jurisdiction to hear the appeal. Petitioners' failure to establish a record in *Hispanic Society* barred their appeal.

POINT I

Petitioners Were Aware of the Existence of Their Claim, Knew of the *Hispanic Society* Litigation, Were Advised to Move to Intervene and Warned That if They Did Not Intervene Their Claim Would Be Precluded. Yet Petitioners Deliberately Chose to Appear at the *Hispanic Society* Settlement Hearing and Present Their Claim Without Moving to Intervene. In These Circumstances, Petitioners May Not Pursue a Separate Lawsuit Attacking a Title VII Consent Decree.

Because petitioners deliberately chose not to intervene in the *Hispanic Society* proceedings, they are barred from collaterally attacking the consent decree. As a rule, collateral attacks on Title VII consent decrees are impermissible. *See, e.g., Thaggard* v. *City of Jackson*, 687 F.2d 66 (5th Cir. 1982), *cert. denied sub nom. Ashley* v. *City of Jackson*, 464 U.S. 900 (1983); *Dennison* v. *City of Los Angeles Department of Water and Power*, 658 F.2d 694 (9th Cir. 1981). But the Court need not reach that issue because, as we show below, petitioners were aware of their claim, had notice of the *Hispanic Society* proceedings, were advised to intervene, and presented their claim without intervening. In these circumstances, petitioners are precluded from attacking the consent decree. *See, e.g., Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 114 (1968); *National Wildlife Federation* v. *Gorsuch*, 744 F.2d 963, 968-72 (3d Cir. 1984).

(1)

As the Court below held, the rule barring collateral attacks on Title VII consent decrees prevents inconsistent proceedings, promotes settlement of Title VII actions and

protects the concept of a final judgment (A9). In addition to the Second Circuit, every Circuit but one to consider the issue has adopted the rule. *See Grann* v. *City of Madison*, 738 F.2d 786, 796 (7th Cir.), *cert. denied*, 469 U.S. 918 (1984); *Thaggard* v. *City of Jackson*, 687 F.2d 66 (5th Cir. 1982), *cert. denied sub nom. Ashley* v. *City of Jackson*, 464 U.S. 900 (1983); *Stotts* v. *Memphis Fire Dept.*, 679 F.2d 541, 558 (6th Cir. 1982), *rev'd on other grounds sub nom. Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561 (1984); *Dennison* v. *City of Los Angeles, supra*, 658 F.2d 694 (9th Cir. 1981); *Goins* v. *Bethlehem Steel Corp.*, 657 F.2d 62 (4th Cir. 1981), *cert. denied*, 455 U.S. 940 (1982); *Culbreath* v. *Dukakis*, 630 F.2d 15, 22 (1st Cir. 1980); *O'Burn* v. *Shapp*, 70 F.R.D. 549 (E.D. Pa. 1976), *aff'd mem sub nom. Lutz* v. *Shapp*, 546 F.2d 417 (3rd Cir. 1976), *cert. denied*, 430 U.S. 968 (1977).

The Seventh Circuit has stated that it does not intend to apply the rule barring collateral attacks. In *United States* v. *Jefferson County*, 720 F.2d 1511, 1518 (11th Cir. 1983), a union moved to intervene in a Title VII proceeding after the fairness hearing but before approval of the consent decree. The Court found the union was not prejudiced by denial of its motion because it could bring a later collateral attack.

We believe *Jefferson County* was wrongly decided. Title VII cases are protracted proceedings. Employees who are on notice of their interest in the Title VII case have many opportunities to protect their interests. *See infra* at 24-27. Ultimately, the need to encourage settlements and protect final judgments requires that employees participate in the Title VII action rather than bring a later collateral attack.

In any event, the *Jefferson County* Court only rejected the rule to the extent it denies nonparties access to court. The Court reasoned that the nonparties in that case could not intervene before implementation of the consent decree and assert a claim of reverse discrimination because they had not yet suffered any wrong. Therefore application of the rule would have denied the nonparties their only opportunity to raise their claim. Because petitioners could have intervened to raise their claim for promotion and did participate in the *Hispanic Society* proceedings, the rule barring collateral attacks did not deny them their day in court.

The rule barring collateral attacks was properly applied here, although the *Marino* complaint was filed before entry of the consent decree, because the *Marino* complaint raised all the problems of a collateral attack. As the Court below explained, at the time of the *Marino* complaint the *Hispanic Society* litigation had "proceeded to a very significant stage" (A10). Because a settlement had been reached and interim hiring orders issued, the *Marino* action raised the specter of inconsistent judgments, threatened the settlement of the Title VII litigation and attacked the concept of a final judgment. The purpose of the rule, ensuring that all interested persons participate in the Title VII proceedings, would be ill served if it could be avoided merely by filing a complaint before the decree is entered.

The *Marino* action is properly termed a collateral attack because it seeks a judgment that is inconsistent with the consent decree. *See Dennison* v. *City of Los Angeles*, *supra*, 658 F.2d at 695-96; *Thaggard* v. *City of Jackson*, *supra*, 687 F.2d at 69. Petitioners' claim to the contrary (Brief at 17) makes no sense, as the Court below held. 806 F.2d at 1147.

Petitioners seek an order placing them on the eligible list and enjoining the Police Department from giving a new promotional examination and establishing a new eligible list until they are promoted. (A28-29). Petitioners' promotion would recreate the examination's disparate racial impact, which the consent decree was intended to redress. Thus, the judgment petitioners seek is antagonistic to the existence of the consent decree.

Moreover, it would require that the Police Department promote almost everyone who took the examination. Petitioners' argument that only they would need to be promoted ignores the existence of the consent decree and the nature of their claim. If petitioners were promoted from the eligible list, the consent decree would require the promotion of additional black and Hispanic test takers to eliminate the re-established disparate impact of the examination (JA71-75). If the Equal Protection Clause were to require petitioners' promotion, it would require the promotion of all similarly situated test takers.

The two judgments could not coexist. If petitioners were promoted, a new group of minority officers would have to be promoted. Then other officers with scores equal to these minority officers would have to be promoted, triggering a cycle of promotions until almost everyone who took the test would be promoted.

Petitioners' suggestion that there was no danger of inconsistent judgments because *Marino* was transferred, over their opposition, to Judge Carter who was hearing *Hispanic Society* (Brief at 17), is meritless. As the Court below noted, the two proceedings are different and would have to be considered separately (A11).

Petitioners argue that because the two actions were before the same judge, they had intervened de facto in

Hispanic Society (Brief at 17). But petitioners never created a factual record in *Hispanic Society* giving an appellate court jurisdiction to hear their claim. *See Bender* v. *Williamsport Area School District*, 475 U.S. 534 (1986), and *infra* at Point II. As the Court below held (A12), there is no de facto intervention although the same judge may hear the two proceedings. *See also Black and White Children of the Pontiac School System* v. *School Dis't.*, 464 F.2d 1030 (6th Cir. 1972).

The *Marino* action is also barred as a collateral attack because it would have precluded settlement of this Title VII action. At the instant petitioners were ordered appointed, the settlement would collapse. As was noted above, petitioners' promotion would recreate the examination's disparate impact. 806 F.2d at 1147. The plaintiffs could not be expected to accept a settlement that did not redress the imbalance in the examination's pass rates. Nor could the City accept a settlement if it would lead to promotion of everyone who took the test. Among other problems, mass promotions would destroy orderly career progression within the Police Department, seriously harming morale by indefinitely blocking promotional opportunities for all police officers who joined the force too late to qualify for the 1983 sergeant's examination.

The Congressional preference for voluntary settlement of Title VII matters would be frustrated if the settling parties were subject to unpredictable collateral attacks. *See Carson* v. *American Brands, Inc.*, 450 U.S. 79, 88 n. 14 (1981). The only way a settlement satisfying all interests can be reached is by requiring petitioners to make their argument for promotion as part of the Title VII action. *See Dennison* v. *City of Los Angeles*, *supra*, 658 F.2d at 696. Claims of discrimination can then be resolved without creating a cycle of lawsuits by majority and minority

employees. *Cf. Johnson* v. *Transportation Agency*, —— U.S. ——, ——, 107 S. Ct. 1442, 1451 n.8 (1987) (employer need not make findings of past discrimination, which would encourage discrimination suits, before establishing affirmative action program); *Wygant* v. *Jackson Board of Education*, —— U.S. ——, ——, 106 S. Ct. 1842, 1855 (1986) (O'Connor, J. concurring) (same).[10]

This Court's decisions in *Local Union No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, —— U.S. ——, 106 S. Ct. 3063 (1986), and *W.R. Grace & Co.* v. *Rubber Workers*, 461 U.S. 757 (1983), are consistent with the rule barring collateral attacks in order to promote settlements, contrary to the United States' suggestion (Brief at 21-24). In *Firefighters* this Court held that intervenors can present their claims to the extent the claims are timely and meritorious. 106 S. Ct. at 3079-80. The rule against collateral attacks, in accord with *Firefighters*, requires intervention in order to present a claim in opposition to a consent decree; the rule prevents nonparties from sitting on the sidelines and then bringing a separate suit once the parties have reached a settlement. Moreover, in accord with *Firefighters*, the consent decree at issue here does not impose any obligations on petitioners. *See Firefighters* v. *Cleveland*, *supra*, 106 S. Ct. at 3079.

In *Grace* this Court held that a conciliation agreement between the EEOC and an employer does not preclude

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[10] The United States is mistaken when it argues that settlement would also have been impeded if petitioners had intervened in *Hispanic Society* (Brief at 23). The parties could have waited to settle until the validity of petitioners' claim was litigated.

Further, if collateral attacks are barred, the parties can settle despite the presence of a nonconsenting party, as happened in *Hispanic Society*, because the only possible attacks on the settlement are a known risk. The parties might also reach a settlement that is contingent on the outcome of the nonconsenters' claim; because they know the nature of the claim they can predict its effect.

the union from asserting rights under a collective bargaining agreement, although enforcement of the contract conflicted with enforcement of the conciliation agreement. But petitioners are not attempting to enforce a contractual right. Under the collective bargaining agreement, petitioners have no right to promotion. Nor do they have a right to promotion, independent of the consent decree, under federal or state law. Petitioners do not claim the examination discriminated against them, therefore they have no claim under Title VII. Because petitioners were not on the eligible list, they have no claim for promotion under state law. *Cassidy* v. *Municipal Civil Service Commission*, 37 N.Y.2d 526, 529, 337 N.E.2d 752, 754 (1975). Therefore, application of the rule against collateral attacks did not upset any expectation of promotion held by petitioners. *See Johnson* v. *Transportation Agency*, *supra*, 107 S. Ct. at 1455 (person on eligible list has no "legitimate firmly rooted expectation" of promotion). For this reason, *Grace* is not comparable to the case at bar. The Congressional policy of promoting Title VII settlements is sufficiently important to require that when a claim deriving solely from a Title VII consent decree is asserted, it be asserted in the Title VII proceeding.

Finally, the *Marino* complaint undermines the concept of a final judgment. Collateral attacks call into question the finality of the judgment under attack. *See Prate* v. *Freedman*, 430 F. Supp. 1373, 1375 (W.D.N.Y.), *aff'd mem* 573 F.2d 1294 (2d Cir. 1977), *cert. denied*, 436 U.S. 922 (1978).[11] It is a waste of judicial resources to allow petitioners to bring a second action which questions the validity of the consent decree, when they could have raised

[11] The United States has argued that respect for final judgments should preclude a later attack on a Title VI consent decree. *See Adams* v. *Bell*, 711 F.2d 161, 202 n.150 (D.C. Cir. 1983) (Wright, J. dissenting).

the issue as part of the first proceeding. *See Thaggard* v. *City of Jackson*, *supra*, 687 F.2d at 69.

(2)

We recognize that a strict application of the rule barring collateral attacks could deny nonparties due process if the claimants could not intervene in the Title VII action because their claim was inchoate or because they lacked notice of the prior proceeding. *See Ashley* v. *City of Jackson*, 464 U.S. 900 (1983) (Rehnquist, J. dissenting from denial of certiorari); *United States* v. *Jefferson County*, 720 F.2d 1511, 1518 (11th Cir. 1983) (rejecting rule to the extent it denies nonparties their day in court). But in this case the rule barring collateral attacks did not deny petitioners their day in court. Petitioners were aware of the existence of their claim, they had notice of the Title VII litigation, they were advised to intervene, they were warned that if they did not move to intervene their claim would be precluded but they decided to present their claim to the Court without intervening. In these circumstances, there is no denial of due process in denying petitioners another opportunity to attack the consent decree. *See Provident Bank* v. *Patterson*, *supra*, 390 U.S. at 114; *National Wildlife Federation* v. *Gorsuch*, *supra*, 744 F.2d at 968-72; *Safir* v. *Dole*, 718 F.2d 475, 483 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1206 (1984); *Adams* v. *Bell*, 711 F.2d 161, 168-71 (D.C. Cir. 1983) (*en banc*), *cert. denied*, 465 U.S. 1021 (1984); 18 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4453.

In *Provident Bank* Justice Harlan proposed an exception to the usual rule that a nonparty is not bound by a judgment and therefore has no duty to intervene. *E.g. Chase National Bank* v. *City of Norwalk*, 291 U.S. 431, 441 (1934). He suggested that a nonparty might be precluded if the

nonparty "purposely bypassed an adequate opportunity to intervene." 390 U.S. at 114. That exception is applicable here.

The exception has been applied by the Third and District of Columbia Circuits in circumstances similar to the case at bar. For example, in *National Wildlife Federation* v. *Gorsuch*, 744 F.2d 963 (3d Cir. 1984), the nonparty was aware of two related proceedings, chose not to move to intervene in the first proceeding, filed an amicus brief in the second proceeding and then moved to intervene but did not appeal the denial of intervention. Instead, the nonparty initiated a third proceeding. The Court held that the *Provident Bank* rule applied:

> In a deliberate choice of litigation strategy, [plaintiffs] chose to stand on the sidelines . . . of their own volition not participants. . . . Plaintiffs cannot, at this stage, assert persuasively that the interest of finality should not prevail.

744 F.2d at 971-72. *See also Society Hill Civic Ass'n* v. *Harris*, 632 F.2d 1045, 1052-53 (3d Cir. 1980) (preclusion if nonparty delayed unreasonably after learning of the litigation and the existence of its claim).

After first cautioning that the *Provident Bank* rule could only apply, if at all, when the nonparty had "timely notice of the litigation," *Consumers Union of the United States, Inc.* v. *Consumer Product Safety Commission*, 590 F.2d 1209, 1222 n.64 (D.C. Cir. 1978), *rev'd on other grounds sub nom. GTE Sylvania, Inc.* v. *Consumers Union*, 445 U.S. 375 (1980), the District of Columbia Circuit has also precluded nonparties where they participated to some extent but did not intervene in litigation. In *Adams* v. *Bell*, *supra*, 711 F.2d 161, the Court sitting *en banc* held that considerations of orderly judicial administration, finality

and avoidance of inconsistent judgments required that a nonparty's only forum for relief be one where the nonparty had chosen not to intervene. 711 F.2d at 169-71.[12]

The nonparty in *Adams* was aware of the other proceedings and had submitted an amicus brief. Similarly, the nonparty in *Safir* v. *Dole, supra*, 718 F.2d 475, had been invited by the Court to intervene in the initial proceedings and did intervene in a later related case but for a limited purpose that did not extend to raising the relevant issue. 718 F.2d at 483. The nonparty's deliberate avoidance of party status in these cases precluded it from later suits challenging the earlier judgments.

The circumstances of this case make application of the rule barring collateral attacks proper under the *National Wildlife* line of cases.[13] As in *Adams*, *Safir* and *National*

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[12] While the Court did not "hold that plaintiffs' failure to intervene [in North Carolina] foreclosed relief otherwise available in the District Court below," 711 F.2d at 169 n. 39, it found that "appellants' failure to intervene in the North Carolina suit undermines their claims before us." 711 F.2d at 170.

[13] Those who have rejected the *National Wildlife* rule have assumed that the nonparties would lack notice of the first proceedings and of the consequences of not intervening and that the nonparties would be forced to litigate in an inconvenient forum. *See Consumers Union* v. *Consumer Product Safety Commission*, *supra*, 590 F.2d at 1222; McCoid, *A Single Package for Multiparty Disputes*, 28 Stan. L. Rev. 707, 718-24 (1976); Comment, *Collateral Attacks on Employment Consent Decrees ("Collateral Attacks")*, 53 U. Chi. L. Rev. 147, 162-65 (1986). *Cf.* Note, *Preclusion of Absent Disputants to Compel Intervention*, 79 Colum. L. Rev. 1551 (1979) (proposing preclusion of nonparties if notice is given).

Those concerns are irrelevant here. Petitioners had notice of the *Hispanic Society* proceedings and notice that they would be precluded if they did not intervene. *See infra* at 26-28. The fear that nonparties will lose their right to choose a proper venue has no place in disputes involving local public employers. The proper venue for the first proceeding will be the same venue the nonparties would choose for the second proceeding, as demonstrated by the case at bar.

Wildlife, petitioners were aware of the litigation, could have intervened and deliberately chose not to. In addition, as in *Adams*, *Safir* and *National Wildlife*, petitioners were not strangers to the first proceeding; they participated as a nonparty in *Hispanic Society*. Other circumstances are important. Petitioners were warned that the rule against collateral attacks would preclude their claim if they did not intervene (Memorandum at 4-5) and they watched another group with similar interests intervene and actively participate (A78). Further, petitioners were not necessary parties to *Hispanic Society* because they would not have been promoted if there had been no Title VII litigation (A68). Moreover, the effect of the consent decree will be short lived; there will be no quotas governing future promotions. For these reasons, petitioners were not denied due process when they were barred from bringing a collateral attack on the *Hispanic Society* consent decree.

As the Court below held, a motion to intervene was "obviously available" to petitioners because they were aware of their claim before entry of the consent decree (A12). Accepting, *arguendo*, petitioners' view that their claim accrued when minority candidates with scores equal to petitioners' scores were promoted,[14] this happened over

[14] We do not agree that petitioners could not act until the hiring orders were issued. Their intervention would have been timely once they had notice of the litigation and were aware of its effect on them. *See United States* v. *Yonkers Board of Education*, 801 F.2d 593 (2d Cir. 1986).

The United States argues that intervention will be impossible in the usual case because the Second Circuit measures timeliness from the date a complaint is filed or from before a consent decree is made public, citing *United States* v. *Yonkers*, 801 F.2d 593, 594-96 (2d Cir. 1986). This is inaccurate. Timeliness is measured, in

(footnote continued on following page)

six months before the *Hispanic Society* litigation ended (A19). Thus, petitioners were not in the position of claimants whose claim does not accrue until after a consent decree had been entered. *Compare Ashley* v. *City of Jackson*, *supra*, 464 U.S. at 902 (viewing claim as accruing one year after entry of the decree); *United States* v. *Jefferson County*, *supra*, 720 F.2d at 1518 (viewing claim as accruing after entry of the decree).

As the United States argues (Brief at 25), nonparties who are unaware of their claim before entry of a decree may not be able to intervene in the Title VII litigation. The rule barring collateral attacks may prevent them from ever having their day in court. *But see Dennison* v. *City of Los Angeles*, *supra*, 658 F.2d at 696 n.2 (collateral attack may be allowed if plaintiffs could not intervene). This concern, however, is irrelevant to petitioners' situation. Petitioners knew of the litigation and its effect on them. As Judge Winter wrote for the Court below in *Hispanic Society* (JA78):

> Other individual police officers and white ethnic societies . . . intervened as parties and vigorously pursued

(footnote continued from previous page)

part, from when the intervenors should have become aware that their interests would be affected by the litigation. *See, e.g.*, *Yonkers*, *supra*, 801 F.2d at 595 ("any prejudice to the [nonparty] may be attributed to their own failure to seek intervention when they first had reason to become aware that the sites at issue would be considered by the Court."); *LaRouche* v. *FBI*, 677 F.2d 256, 257 (2d Cir. 1982) (Intervention two years after judgment allowed where intervenor was ignorant of the litigation and its effect on her rights). Other Circuits also measure timeliness in part from when the putative intervenors should have been aware of the litigation and the existence of their claim. *Cooley* v. *Jackson Police Dept.*, 755 F.2d 1207, 1209-10 (5th Cir. 1985); *Garrity* v. *Gallen*, 697 F.2d 452, 456-57 (1st Cir. 1983). *See generally* 7A Wright, Miller & Kane, *Federal Practice and Procedure* § 1916 at 430-34.

their interests. We perceive no reason why appellants could not have done the same.[15]

Petitioners do not contend they lacked notice of the *Hispanic Society* litigation, *compare Dennison* v. *City of Los Angeles, supra,* 658 F.2d at 696, and the filing of the *Marino* complaint is graphic proof that petitioners knew of the proceedings. As in most Title VII cases involving public employers the litigation was widely publicized. *See, e.g., Reeves* v. *Wilkes,* 754 F.2d 965, 969-70 (11th Cir. 1985). News articles, editorials and letters to the editor discussed the *Hispanic Society* plaintiffs' demand for quota promotions, the City officials' reactions and the position of the unions. *See, e.g.,* New York Amsterdam News 9/8/84 at 1 (article); New York Daily News 9/5/84 at 27 (editorial), at 26 (op-ed); New York Post 9/5/84 at 32 (editorial), 9/12/84 at 34 (letter); New York Times 8/31/84 at A-1 (article), 9/14/84 at A-30 (letter). Other articles discussed the terms of the proposed settlement. *E.g.,* New York Times 11/18/85 at A-1. If petitioners had not actually known of the *Hispanic Society* proceedings, the publicity could have brought the case to their attention. Those who sit for a promotional examination can be expected to follow with interest reports of litigation over the exam.

Moreover, notice of the terms of the proposed settlement and the date of the hearing was posted in all New York City Police Department precincts, giving all police officers a complete description of the proposed settlement before the entry of the consent decree (JA84). If petitioners had not already known of the proposed consent decree,

[15] In its *Marino* decision the same panel stated (A12):

> Attempting intervention in *Hispanic Society* was obviously available to appellants when they commenced this action since the final consent decree in that litigation had not yet issued.

the notice posted in the precincts would have been reasonably certain to inform them of the proposed settlement. *See Mennonite Board of Missions* v. *Adams,* 462 U.S. 791 (1983); *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950).

In addition to being aware of their claim and the *Hispanic Society* proceedings, petitioners were advised to move to intervene. Once petitioners filed their *Marino* complaint, the New York City respondents specifically informed them that they should intervene in *Hispanic Society* (A37).[16]

Petitioners could not have believed such a motion would be futile. The Schneider group had intervened in *Hispanic Society* without City opposition (HR 4, Motion to Intervene by Hyman *et al.;* HR 5, Levitt Affidavit in Response) and the District Court had responded favorably to motions to intervene. For example, the District Court had granted the Schneider motion *in toto* despite plaintiffs' request that the Schneider intervention be limited to the issue of relief (HR 6 Kimerling Affidavit in Opposition to Motion to Intervene; Memo Endorsed "So ordered" by Judge Carter, 1/14/85). Moreover, a later motion to intervene had been granted. The SEA did not move to intervene until November 15, 1985, six weeks before petitioners filed their *Marino* complaint (HR 18, Aab Motion to Intervene; Order filed 11/22/85).

Petitioners were also warned of the consequences if they failed to move to intervene. Defendants described the rule against collateral attacks in their memorandum in support

[16] Defendants stated in their Declaration in support of their motion to dismiss the complaint (A37): "Defendants therefore respectfully request that this Court dismiss the instant action and direct plaintiffs to seek intervention in the *Hispanic Society* litigation or to file objections to the consent decree once proposed."

of the motion to dismiss the *Marino* complaint (Memo at 4-5). Thus, petitioners knew that their claim would be precluded if they did not intervene.

As the Court below noted, if petitioners' motion to intervene had been denied, the denial could have been appealed (A12). Petitioners, who never even tried to intervene, are not in the position of plaintiffs for whom a collateral attack is the only way to bring their claim before the courts. *Compare Ashley* v. *City of Jackson, supra*, 464 U.S. at 902 (motion to intervene was denied).

Instead of intervening, petitioners chose to participate in the *Hispanic Society* proceedings by appearing at the *Hispanic Society* fairness hearing and presenting their objections to the District Court (A64). Therefore, the United States' concern that "unrepresented third-persons" need to be able to mount collateral attacks (Brief at 20-21), is irrelevant to these petitioners who were represented and appeared in *Hispanic Society*. The Court considered "appellants' claims, and found them to be without merit." *Marino* v. *Ortiz*, 806 F.2d at 1147.

If petitioners had intervened, they would have been entitled to little more process than they had already received at the fairness hearing. The District Court would have considered their claim for promotion under the Equal Protection Clause, as it did here (A98-99). Intervenors may present their substantive claims, to the extent they are timely and meritorious, but they cannot force a trial or prevent entry of a consent decree. *See Firefighters* v. *City of Cleveland, supra*, 106 S. Ct. at 3079-80. Therefore, as the Court below found, there is no need to allow these petitioners to bring a collateral attack. They have had "one opportunity already to contest the . . . order [and] the time to relitigate that issue has necessarily run," 806

F.2d at 1147 *quoting Class* v. *Norton*, 505 F.2d 123, 125 (2d Cir. 1974).

Perhaps petitioners decided against attempting intervention because of the presence of the Schneider intervenors, who argued that the consent decree was unconstitutional. In that event, when the Schneider intervenors withdrew their appeal, petitioners should have intervened to pursue the appeal. Petitioners were aware of the Schneider intervenors' decision to withdraw their appeal; their attorney signed the stipulation (Stipulation Withdrawing Appeal at 3, filed 10/9/86).

Once again, such a motion would have been timely. This Court has held that a motion to intervene for the purpose of appealing is timely when made promptly after learning the party who represented the intervenors' interest would not appeal. *See Bryant* v. *Yellen*, 447 U.S. 352, 366-67 (1980); *United Airlines Inc.* v. *McDonald*, 432 U.S. 385 (1977). *See also Triax Co.* v. *TRW, Inc.*, 724 F.2d 1224 (6th Cir. 1984).

Petitioners were not necessary parties to the *Hispanic Society* proceedings.[18] Before a settlement was reached, petitioners had no interest to vindicate; the existence of the interim hiring order was a necessary predicate for petitioners' claim. Therefore, petitioners could not have claimed "an interest relating to the subject of the action."

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[18] The parties did not brief or argue the joinder issue to the Second Circuit panel that decided this case and the Court of Appeals did not address the issue. Because respondents informed the Court in their response to the petition for certiorari that this issue was not briefed in the Court of Appeals (Joint Brief in Opposition at 12 n.4), petitioners may not raise the issue in this Court and we suggest this Court should not consider it. *See E.E.O.C.* v. *Federal Labor Relations Authority*, ___ U.S. ___, 106 S. Ct. 1678, 1681 (1986); *Oklahoma City* v. *Tuttle*, 471 U.S. 808, 815-16 (1985).

Fed. R. Civ. P. 19(a). *See Challenge Homes, Inc.* v. *Greater Naples Care Center, Inc.*, 669 F.2d 667, 670-71 (11th Cir. 1982); 3A *Moore's Federal Practice* ¶ 19.07[2.-0].

Petitioners' interest in the litigation over the examination is, at best, attenuated. They would not have been promoted in the absence of the consent decree. *Compare Dennison* v. *City of Los Angeles, supra,* 658 F.2d at 695. As Judge Winter wrote for the Court below in *Hispanic Society* (A68):

> [A]ppellants were not on the original eligible list, they have no right to promotion under state law, and they do not allege that the examination discriminated against them. Even if the settlement were invalidated, therefore, they would not be entitled to promotion.

Moreover, the consent decree governs only this examination and eligible list. Once a new examination is given, the quotas will expire (JA70-75). *Compare Reeves* v. *Wilkes*, 754 F.2d 965, 967 (11th Cir. 1985) (50% promotional quota of indefinite duration).[19]

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[19] It might be argued that petitioners' future promotional opportunities could be affected if they were to take the next offered sergeant's examination, score high enough to be on the eligible list, but are not promoted solely because sufficient sergeant positions are unavailable, because of the minority officers promoted under the consent decree.

However, this is not an interest petitioners have ever asserted. Petitioners have sought only their own immediate promotion; they have never argued for destruction of the consent decree or preservation of future promotional opportunities. Therefore, petitioners could not be joined to represent this interest. In any event, this interest, which is shared by the 10,000 officers who took the examination but were not promoted, does not involve a pre-existing employment right because the 10,000 have no right to promotion. *See Johnson* v. *Transportation Agency, supra,* 107 S. Ct. at 1455; *Cassidy* v. *Municipal Civil Service Commission, supra,* 37 N.Y.2d at 529.

Even when the relief requested does affect the interests of majority employees, individual employees have rarely been considered necessary parties to Title VII litigation. Individual employees have only been considered necessary parties when their pre-existing employment rights were threatened. *Compare Kirkland* v. *Dept. of Correctional Services*, 520 F.2d 420, 424 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976) (majority employees are not indispensable parties; they can protect their interests through intervention); *Jackson* v. *Sargent*, 394 F.Supp. 162, 173 (D. Mass.) *aff'd on other grounds sub nom. Jackson* v. *Dukakis*, 526 F.2d 64 (1st Cir. 1975) (no joinder where majority employees can intervene); *with English* v. *Seaboard Coast Line R.R.*, 465 F.2d 43, 46 (5th Cir. 1972) (joinder where employees would lose seniority rights); *Bremer* v. *St. Louis S.R.R.*, 310 F.Supp. 1333, 1339 (ED.Mo. 1969) (joinder where employee would lose job). *See generally* Comment, *Collateral Attacks*, 53 U. Chi. L. Rev. at 174-76. Petitioners do not fall within this exception because they had no right to promotion in the absence of the consent decree.

Joinder was not an issue before the District Court because all persons claiming an interest related to the 1983 eligible list for promotion to sergeant were parties. The groups who had an expectation of promotion—the provisionally appointed sergeants and the persons on the eligible list—had intervened. The interest of anyone arguing that the use of promotional quotas is unconstitutional on the *Hispanic Society* facts was represented by the Schneider intervenors.

Those who were parties encompassed the groups that had in the past attempted collateral attacks on consent decrees. *See Dennison* v. *City of Los Angeles, supra,* 658 F.2d at 695 (union representing persons denied promo-

tions, individuals denied promotions); *Ashley* v. *City of Jackson, supra,* 464 U.S. at 901 (persons denied promotions); *Goins* v. *Bethlehem Steel Corp., supra,* 657 F.2d at 63 (union representing all whose seniority was affected); *Prate* v. *Freedman, supra,* 430 F.Supp. at 1374 (job applicants who were passed over).

The interested groups worked out a settlement satisfying plaintiffs, defendants and everyone with an expectation of promotion. The Schneider intervenors did not join the settlement, but they did not appeal, demonstrating a willingness to live with the results. While petitioners are evidently dissatisfied with their failure to be promoted, they chose not to become a party with full knowledge that their choice would preclude their claim. Application of the rule barring collateral attacks to petitioners is a reasonable means of satisfying the need for consistency, finality, and promotion of settlements, as long as they had actual notice of the Title VII litigation and were able to protect their interests by intervening in the litigation. Because petitioners met these conditions, they were properly barred from bringing a collateral attack on the *Hispanic Society* consent decree.

POINT II

Because Petitioners Were Not a Party to the *Hispanic Society* Litigation and They Deliberately Chose Not to Intervene, They Cannot Appeal the Entry of the Consent Decree.

As nonparties to the record and judgment below, petitioners cannot appeal the *Hispanic Society* judgment. *See, e.g., Bender* v. *Williamsport Area School District,* 475 U.S. 534, ——, 106 S. Ct. 1362, 1335 (1986); *United States ex rel. Louisiana* v. *Jack,* 244 U.S. 397, 402 (1917); *Martin-Trigona* v. *Shiff,* 702 F.2d 380, 385 (2d Cir. 1983).

In *Bender* this Court explained that the rule barring appeals by nonparties is jurisdictional. Because nonparties will create no factual record demonstrating their interest and injury, there is no concrete controversy before the Court. 106 S. Ct. at 1331-32. Therefore, nonparties lack standing to appeal.

The school board defendant in *Bender* decided against appealing a District Court judgment against it. One school board member, however, did appeal. This Court held that the school board member lacked standing to appeal. In order to appeal from the District Court judgment as an individual or a parent, the school board member would have to move to intervene in the litigation.

There was nothing in the *Bender* record describing the appellant's parental status or describing the injury he suffered as a parent or individual. Similarly, there was nothing in the *Hispanic Society* record describing the appellants' status as police officers or describing the injury they suffered. Therefore, the record does not contain the factual predicate for the appeal and petitioners lack standing.

Petitioners argue that they did not need to intervene because they were included within the definition of "New York City defendant" in the Stipulation of Settlement (Brief at 33).[20] The Court below properly rejected this argument. The settlement can only define the parties to the settlement; the settlement can not add or subtract parties to the litigation (A69-70).

The definition binds petitioners to comply with the settlement in their official capacity as New York City police officers (A70). Because those sued in their official capacity

[20] The definition of New York City defendants includes "all officers, employees or agents . . . of the City of New York. . . ." (JA65-66).

lack standing to appeal in another capacity, *Bender* v. *Williamsport Area School District, supra,* 475 U.S. 534, petitioners who were never parties in any capacity may not rely on the settlement definition for standing to appeal.

Some of the petitioners filed objections to the consent decree and their counsel appeared at the fairness hearing held by the District Court. This appearance is insufficient to give the objecting petitioners standing to appeal entry of the consent decree because, as the Court below held, it is not equivalent to intervening in the case. (A74-75). An objector is more accurately analogized to an amicus curiae than to a party. *See United States* v. *LTV Corp.,* 746 F.2d 51, 53 (D.C. Cir. 1984); *Moten* v. *Bricklayers, Masons & Plasterers Int'l Union,* 543 F.2d 224, 227 (D.C. Cir. 1976) 3B *Moore's Federal Practice* ¶ 24.15 at 24-170 ("An intervenor must be sharply distinguished from a mere amicus curiae or a person who has been heard but has never intervened.").

The few exceptions to the rule that a nonparty may not bring an appeal are not relevant to this case. Petitioners are not a real party in interest, *see Martin-Trigona* v. *Shiff,* 702 F.2d 380 (2d Cir. 1983), and were not brought into the case over their objection. *See SEC* v. *Wencke,* 783 F.2d 829, 834-35 (9th Cir.), *cert. denied,* —— U.S. ——, 107 S. Ct. 77 (1986). *See generally* 9 *Moore's Federal Practice* ¶ 203.06 at 3-23; 15 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3902. Moreover, as the Court below held, petitioners do not have an interest affected by the trial court's judgment because they would not be promoted even if the consent decree were invalidated (A68).

Petitioners' decision not to move to intervene is inexplicable. It could not have been due to a lack of finances.

Petitioners could afford the *Marino* action and they also filed objections and a Rule 60(b) motion in *Hispanic Society.* Thus, there is no equitable basis for relaxing the standing requirements in order to hear petitioners' appeal. *See In re Proceedings Before the Federal Grand Jury for the District of Nevada,* 643 F.2d 641, 643 (9th Cir. 1981).[21]

As the Court below found, petitioners created their problems by "their steadfast refusal to comply with the requirements for intervention set forth in Fed. R. Civ. P. 24." (A75). The strong public policy favoring voluntary settlement of Title VII cases, *e.g., Firefighters* v. *City of Cleveland, supra,* 106 S. Ct. at 3072 (1986), would hardly be served by allowing these petitioners, who were aware of the litigation but never attempted to intervene, to prosecute their appeal as a nonparty to the case.[22]

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[21] If petitioners had decided not to intervene because of the Schneider group's intervention, then they could have moved to intervene to pursue the appeal when the Schneider group withdrew their appeal. Such a motion would have been appropriate. *See United Airlines, Inc.* v. *McDonald, supra,* 432 U.S. 385. Similarly, if petitioners had not had earlier notice of the *Hispanic Society* proceedings, intervention in order to appeal would have been appropriate.

[22] Petitioners request that this Court review the consent decree's constitutionality (Brief at 49, 75). This request is improper. The question of the decree's constitutionality is not within the grant of the writ of certiorari, which was limited to questions 2 and 3 of the petition.

CONCLUSION

The Judgments of the Court of Appeals Should Be Affirmed.

August 22, 1987

Respectfully submitted,

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REPLY

BRIEF

86-1415

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

EVELYN MARINO, et al,
Petitioners

v.

JUAN U. ORTIZ, et al.,
Respondents

and

WAYNE COSTELLO, et al.,
Petitioners

v

THE NEW YORK CITY POLICE DEPARTMENT, et al.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITION FOR CERTIORARI FILED FEBRUARY 28, 1987
CERTIORARI GRANTED MAY 18, 1987

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2. Consideration respecting Election 5.

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STATEMENT

Opposing briefs do not contest the assertion that **New York Constitution,** Art. V, Sec. 6, defines equal protection of the laws in competitive examinations. Nor do they contest the fact that the parties in **Hispanic** had timely prehearing and predecretal notice of the claims of the **Marino** and **Costello** petitioners. The briefs attempt to endorse view that **FRCP Rule 24** is mandatory rather than permissive, and that prejudgmental collateral suits are impermissible attacks even if they are mounted before any final decree is entered. The briefs also dispute the petitioners' contention that making petitioners parties to the action by compulsory joinder under **FRCP Rule 19** was the appropriate and required method by which to bind petitioners to the results of the **Hispanic** settlement.

PETITIONERS HAD THE RIGHT OF ELECTION OF REMEDY UNDER 42 USC 1983 WHICH WAS NOT FORECLOSED BY REASON OF THE PRIOR ELECTION BY OTHERS TO PURSUE THEIR REMEDIES UNDER TITLE VII, WITHOUT THOSE PARTIES JOINING PETITIONERS UNDER FRCP RULE 19.

1. Election of Remedies

Congress has provided a range of remedies for the redress of grievances directed against persons acting under color of state authority who are allegedly depriving a person of his constitutional rights as defined under the Equal Protection of the Laws component of the Fourteenth Amendment to the **United States Constitution.**

Litigants are free to pursue such of these remedies as appear appropriate. This election of remedies is not foreclosed when others elect an alternate remedy. A person can only be compelled to participate in a proceeding if he is

served with process making him a party defendant. In the cases below the petitioners were not served with process and the court of appeals determined that they were not made personal defendants by the district court order.

The **Hispanic** plaintiff classes below elected to seek redress of grievances under **Title VII.** Although **42 USC 1983** was an available remedy, they considered **Title VII** more appropriate to their cause. Their election of remedy could not bind the petitioners herein unless the petitioners were impleaded under the compulsory joinder provisions of **FRCP Rule 19.** This is particularly so since they had full written and timely knowledge of the petitioners' constitutional claims.

The provisions of **42 USC 1983,** were, and are the traditional available vehicle by which to seek vindication of

the Equal Protection of the Laws component of the Fourteenth Amendment to the **United States Constitution. Title VII** is nothing more than an additional remedy which in no way supplants, limits, amends or repeals the provisions of **42 USC 1983.**

The cause of the petitioners falls within the clear purvue of **42 USC 1983** (jurisdictional basis cited in paragraph 1 of the **Marino** complaint Pet. A 14). The **Marino** suit was instituted well in advance of the hearing and well before the final decree in **Hispanic.** All parties had notice of the claims of the petitioners and their suit. The claim arose in November, 1985 when the beneficiaries of the settlement with a grade equal to or lower than the excluded

Marino plaintiffs were promoted. the **Marino** suit was instituted in December 1985.

The **Marino** complaint invoked the district court's jurisdiction under the authority of **42 USC 1983** and such authority was not diminished by the choice of the **Hispanic** plaintiff classes of **Title VII** remedy. When persons with equivalent or lower grades are promoted to the exclusion of the complainants, equal protection prima facia has been denied. This makes seasonal and appropriate a petition for redress of grievances to the courts under the authority of **42 USC 1983** for violation of the Fourteenth Amendment equal protection of the laws section, as such is defined under the circumstances by **New York Constitution,** Art V, Sec. 6.

2. Considerations respecting Election.

The determination as to whether or not to intervene in the **Hispanic** and **Guardian** suits had to be made under such circumstances which would avoid compromising the **Marino** plaintiffs' constitutional claims. Many nuances and strange concepts have evolved, or are in the process of evolving in the developing field of racial remedy.

a. Intervention under the permissive intervention provisions of **FRCP 24** in the first instance and foregoing the institution and maintainance of an action under **42 USC 1983** could subject those following such a course to a claim, real or imagined, by the parties therein, that the **Marino** plaintiffs had made an election of remedies of **Title VII** by such participation. Such claim would have to be defended against both in the district

court and on any appeal therefrom. As hereinafter discussed, it would also tend to dilute the traditional and clear claim of plaintiff standing under **42 USC 1983** which stands or falls on its own substantive elements without the need to resort to other sections such as **Title VII** to support it. It was and is the remedy of choice of the **Marino** litigants.

b. The most important consideration was that **42 USC 1983** is a federally cognizable claim and was enacted specifically in response to the need to enforce the 14th Amendment to the **United States Constitution.** There is no dispute in adversary briefs to the petitioners' assertion that the competitive examination requirement of **New York Constitution** Art. V, Sec. 6 is the definition of due process of law under the circumstances. Nor is there any denial therein that at the time of the

final decree in June, 1986 there were over four hundred vacancies in the rank with many accruing each month; that all members on the original list and all beneficiaries of the settlement had been promoted or passsed over for other reasons, none of whom would be demoted by reason of the litigation; that no new examination had been given for the position; that no new list existed; and that petitioners were qualified to assume the rank of sergeant. It was this violation of the **Fourteenth Amendment** which was and is the basis of the **Marino** litigants' **42 USC 1983** complaint. The section has not been overruled, repealed, restricted, amended or otherwise impaired in its availability and potency by **Title VII** or any other statute. There appears to be no substantive bar to its election.

c. If the choice to intervene were made would the **Marino** litigants attempt

intervention as plaintiffs or as defendants? Would the their complaint have to make assertions which would be unnecessary in their **42 USC 1983** claim, thereby requiring proof beyond that which was required in their basic cause of action? If the **Marino** litigants intervened as parties defendant, they would lose traditional plaintiff control of their cause of action. Plaintiffs take control, defendants react to that control Their claims would be, and in fact were submerged within the litigation controlled by the plaintiff as discussed herein. All of these procedural problems are rendered inappropriate by the availability of a fully authorized plenary action under **42 USC 1983**

d, There was no procedural bar to the election by **Marino** of **42 USC 1983** as the remedy of choice. The doctrine of

impermissible collateral attacks relates to post final decree or post final judgment suits where theoretically, it could be rationalized as a concept akin to laches, waiver, res judicata or collateral estopple. Moreover, the objector hearing, assuming it were not a foregone conclusion, provided a vehicle for the claims of the petitioners to be made known to the judge hearing the matter before final decree or judgment, thus avoiding inconsistent results, while, at the same time preserving intact the **42 USC 1983** claim, without a perceived waiver by petitioners or perceived election of remedies by them which would be prejudicial to such claim. The cases on which adversary counsel and the courts below rely, concern themselves with collateral attacks mounted after the final decree, or final judgment was entered. They are not relevant to what

transpired below. Until final, the litigating parties have, as they had here, the ability to join, consolidate or otherwise argue against the substantive merits of persons seeking redress. With such opportunity, there was no danger of inconsistent final results, and hence the concept of impermissible collateral attack is inapplicable.

e. Intervention in another's lawsuit poses the danger of submerging or subordinating both in a procedural and a substantive sense the claims of the intervenors. Examples of this danger are amply illustrated by what transpired below.

1. For example, the district court was dealing with a **Title VII** suit and the identity of the **Marino** and **Costello** claims were narrowly viewed in that context by that court to the exclusion of their **42 USC 1983** claim.

Thus, while petitioners' attorney was arguing violation of the equal protection of the laws component of the **Fourteenth Amendment,** the court was considering only in **Title VII** elements. This is amply illustrated by both the oral argument and the district court's opinion. At oral argument, the court interrupted the attempt by counsel to reconcile his **Fourteenth Amendment** position with the **Title VII** settlement then under consideration by stating:

> THE COURT: Please, please. The problem we have with it don't quote me and cite me something that is not the law. You are now making an argument, but that's not the law and you are a lawyer. That makes no sense. These people were dealing with what they regarded to be the regulation and rules which they were under Title VII. You are now making an argument that's contrary to the rules of law that govern decisions under Title VII. And I can't deal with that. You are expressing a personal opinion. I can't deal with that. I have to deal with what I understand the law to be and

> that's what all the argument has been up to now. You are arguing that Title VII law shouldn't be what it is. I don't know. Maybe you are right.
>
> MR. PODOLSKY: I believe I am, your Honor.
>
> THE COURT: I don't want to hear about that because I have to deal with the law. Unfortunately you are not the Second Circuit and you are not the Supreme Court of the United States to whom I have to look for guidance. (Pet. A104-106).

This refusal of the court to consider the Petitioners' Fourteenth Amendment equal protection of the laws claim in the **Title VII** proceeding is illustrative of the submersion danger of foregoing a timely, predecretal independent **42 USC 1983** litigation and electing the remedy of **Rule 24** permissive intervention in another party's lawsuit.

2. The submersion was thereafter embodied by the district court in its opinion in **Hispanic** which rejected the **Costello** claims by limiting any

consideration thereof to **Title VII** concepts, completely excluding consideration of any Fourteenth Amendment equal protection of the laws argument. Thus the court wrote with respect to the **Costello** claim:

> Some of the objectors allege that they too should benefit by the settlement and be promoted since they scored as high or higher than some minority members being selected for promotion pursuant to the settlement. While such personal dissatisfaction with the agreement is understandible, there has been no showing of the test's disparate racial impact on any of the white applicants who object to no being placed on the eligible list. Hence Title VII's requirement of remediation is not brought into play.*** Here the settlement deals merely with correctin of the disparate impact of Examination #2548. Whether the settlement solution is approved or disapproved, those white applicants who did not score high enough to be placed on the eligible list will have no viable claim to be added to the list and no legal basis for challenging their failure to qualify for promotion. [Emphasis supplied] (Pet. A98).

The court ignored the **Fourteenth Amendment** claims of the petitioners and limited its consideration to **Title VII** claims of racial discrimination. This Court in **Local No. 93, International Association of Firefighters v. City of Cleveland,** 478 US __ (1986) has clearly and specifically held that approval of **Title VII** settlements must include considerations of not only the allgations of racial discrimination but those of violation of Equal Protection of the Laws under the **Fourteenth Amendment** asserted by others. See also the concurring opinion of Justice O'Connor therein.

f. Attempted Intervention in the **Title VII** lawsuit posed the danger that the motion would be denied on some theory that either the corporation counsel or some other party adequately represented the personal rights of the proposed

intervenors, or that there was no merit to the claim justifying intervention. The latter consideration has already been illustrated by the district court's decision as cited. The former contention has been asserted by some of the briefs of other parties. Although, as suggested by the court of appeals, a denial of the application to intervene would be appealable, this course represented an unacceptable procedural delay and snare rendered entirely unnecessary by the availablity of **42 USC 1983** as the appropriate remedy to elect.

3. Application of Considerations to Election

Faced with these considerations, the decision to institute the **42 USC 1983** action was the most appropriate course. There was no impediment in doing so. Further, the determination to submit papers seeking modification of the

proposed settlement in **Hispanic** and at the same time to fully preserve the **Marino** litigation was and is the most appropriate approach to avoiding claims of waiver or election and at the same time fully and fairly appraising the parties of the petitioners' constitutional claims. It was thus asserted in the Costello submission in **Hispanic** that, "Nothing herein is to be construed to be in lieu of or by way of diminution of the case of **Marino et al v Ortiz, et al,** 85 Civ 10068 (RLC), currently before this Court. The comments herein are made lest failure to do so be perceived as consent to the content or impact of the settlement." The Costello petitioners consisted of all the **Marino** plaintiffs and some others in similar circumstances.

The **Marino** plaintiffs did not intervene in **Hispanic** because they

elected as their remedy of choice, a timely plenary action fully authorized by **42 USC 1983.** Similarly, none of the **Hispanic** parties chose to implead the **Marino** plaintiffs under the compulsory joinder **FRCP Rule 19** although authorized to do so and although fully and timely aware of their constitutional claims. Moreover, the case was not the result of a finding of fact and conclusion of law after full trial but was and is no more than an agreement between some of the parties which was approved by the court.

The view that the appropriate procedure under the circumstances would be for the **Hispanic** parties to join the **Marino** litigants under the compulsory joinder provision of **Rule 19** should come as no great shock to the municipal respondents herein. They specifically endorsed the precise position taken by the Petitioners and the Department of

Justice when they asserted on two different occasions in answers to the **Hispanic** and the **Guardian** complaints the specific affirmative defense of **FRCP Rule 19** compulsory joinder. See: Answer of the Municipal Respondents to the **Hispanic** and the **Guardian** complaints, Par. 16 in each at JA 37 and 43 respectively wherein it was asserted:

> 16. Those persons who successfully passed the examination No. 2548 and who are awaiting promotion based on its results are necessary and indispensable parties to this action as described in Federal Rule of Procedure 19.

To bind the petitioners herein the parties to the **Title VII** litigation were obligated to follow that procedure, as the petitioners' **Fourteenth Amendment** rights were specifically defined by Art. V, Sec. 6 of the **New York Constitution,** and were timely asserted well before the final decree or final judgment was entered.

The Costello Petitioners contention that they were necessary parties is not being urged for the first time in this court. (Sergeants Benevolent Association brief pp. 20-29.) It was asserted before the Court of Appeals. (Pet. Reply Brief A-4) in opposition to motions to dismiss the petitioners' **Hispanic** appeal with sanctions. The motions were denied without prejudice to renew. The Sergeants Benevolent Association specifically renewed its motion by footnote 11 of its brief before the circuit court panel that heard the appeal in chief. That branch of the motion seeking dismissal of the appeal was granted and that branch of the motion seeking sanctions was denied. (Pet. A-78; Record: Brief of Sergeants' Benevolent Association, Court of Appeals, p.15 fn.11).

The assertion of the Sergeants Benevolent Association that **Rule 19** has

been established by Congress for the protection of the then litigating parties is correct and entirely supportive of the petitioners' contention herein. If litigating parties follow the prejudgmental mandate of compulsory joinder authorized by **Rule 19,** they are specifically protected from collateral actions by joining those known persons into the suit as they would any other defendant. If the litigating parties forego compulsory joinder, as they did here, the protection under **Rule 19** is not available against contemporary prejudgmental suits by others who were not made parties the litigation. Prior to final judgment or final decree the parties to the litigation were free to avail themselves of the **Rule 19** joinder protection in order to bind them in a due process sense. They cannot claim the **Marino** litigation is an impermissible

collateral attack by forging from the shield of their compulsory joinder protection a sword with which to attack a fully authorized civil rights action by others. This is particularly true when those non-joined persons did not stand idly by and just let things happen. Here the **Marino** suit and the **Costello** objection requests supplied a generous abundance of fully authorized court activity calculated to, and which in fact did, appraise all litigating parties that "...(2) the person claims an interest relating to the subject of the action and is so situated that disposition of the action in the person's absence may... (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of the claimed interest..." (Rule 19, FRCP). With this

specific notice, the litigating parties were compelled to join the petitioners if they wished to bind them and avail themselves of the protection afforded by this **Rule 19** requirement.

Moreover any view that the Schneider ethnic society intervenors somehow pursued the claims of the petitioners is without merit. Those intervenors took the position that the beneficiaries of the settlement had failed the examination and were not qualified to hold the rank of sergeant. They generally made an outright assault in the employment of racial remedy under any circumstances. They called for the minorities to be displaced or demoted. (Record: Hispanic Docket entry 47 and 75 Intervenor defendant objection and additional objection). This position was and is directly contrary to those of all others including the **Marino** and **Costello**

petitioners herein. **Marino** and **Costello** asserted that the beneficiaries of the settlement had in fact demonstrated their merit and fitness for the position of sergeant as had they, but that the use of racial remedy in these circumstances was not narrowly tailored to avoid an unnecessary exclusionary device. Other parties recognized that the cutoff defined the perceived manpower needs of the department and did not define minimum competency, and that the beneficiaries of the settlement as well as the petitioners herein were fully qualified to hold the position.[1] (Affidavit of Personnel Director Levitt in Support, JA-148; Affidavit of Kimerling par. 24, JA-132; submission of Responding Police Officers (Petitioners herein) par 15, JA-193; complaint par. 12, Pet. A-18).

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[1] The assertion that enforcement of petitioners' constitutional claim would lead to a never-ending round of

promotions is baseless. The named petitioners did not bring nor have they been designated representatives in a class action. All parties agree petitioners are qualified for the rank. Lower scoring minority and majority candidates may or may not be qualified by reason of their test scores to assume the rank, an issue not present on this petition. Upon demonstration thereof there would be no requirement that such candidates be promoted. If actions by any majority members are mounted in the future, the laches, estopple, waiver or other concepts sought to be employed against the petitioners herein could become seasonal at that post judgmental stage. Lockstep adherance to a numerical percentage quota is not a requirement of the remedy, A time preference can and should be viewed as a sufficient remedy, especially where, as here, vacancies in the rank existed and are expected to arise before the next scheduled examination, thus making exclusion of the petitioners entirely unnecessary. See e.g. **Vulcan Society v City of New York, et al,** 96 F.R.D. 626 (SDNY 1983). [percentage of minority fire captain candidates perceived to have failed added to list with a provision for displaced original passing candidates to be promoted thereafter, partially recreating disparate percentage]. The minority beneficiaries here would have a considerable advantage over petitioners on the next police lieutenants' examination as suggested in petitioners' main brief.

Unlike the Schneider intervenors, the petitioners did not seek the displacement or demotion of the beneficiaries of the settlement or of anyone else. JA 204, par. 29. The Schneider intervenors were not granted nor did they seek class representative status nor did they pursue an appeal. The petitioners and virtually all other parties contend that they are qualified to hold the rank of sergeant as are their minority collegues with equivalent or lower grades heretofore promoted. The position of the Schneider intervenors was and remains an opposing one to that of the Petitioners.

The standing of the **Costello** Petitioners to pursue the appeal from the Order approving the settlement and rejecting their views is fully justified. In **Local 93, International Firefighters v Cleveland,** supra, this court noted that a

Title VII settlement should not be approved if it violates the 14th amendment rights of others. The question remains: what if the 14th Amendment rights of others are impaired by the settlement, and district court approval? None of the parties to the settlement will remedy the situation by appealing from their own agreement.[2] The court of appeals has no self-executing appeal procedures to deal with such a contingency.

---

[2] The Hispanic Society may have an unintended conflict within its own membership. Some Hispanic candidates are in precisely the same position as the petitioners herein, i.e. having scores higher than the lowest scoring black beneficiary promoted but below the Hispanic beneficiary cutoff. Their constitutional competitive rights appear to have been subordinated.

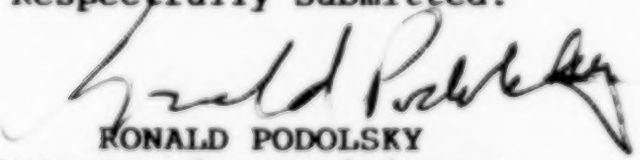
The only persons who can and should take steps by appeal under the circumstances are those persons who are not remote to the litigation, whose rights are alleged to have been directly impaired and who should have been made parties under **Rule 19, FRCP** in the first instance.

The **Costello** petitioners are not remote to the litigation. They are police officers who took the subject examination and who outscored the beneficiaries of the settlement and have been excluded from promotional consideration. Those with a mark below the lowest minority beneficiary are not aggrieved. Under **New York Constitution,** Art. V, Sec. 6, provisions there is a prima facia violation of equal protection of the laws. Thus petitioners are not interlopers or officious intermeddlers taken at random from a phone book. See:

United States ex rel. Louisiana v Jack, 244 US 397 at 402 (1917); **Ex parte Cutting,** 94 US 14, at 20-22 (1876); **W.R. Grace & Co. v Rubber Workers,** 461 US 757 (1983); **Martin Trigona v Shiff,** 702 F.2d 380 (2d Cir. 1985); **Citibank Int'l v Collier Traino, Inc.,** 809 F2d 1438,1441 (9th Cir. 1987). Nor are they unaffected employees of the Police Department or other departments. Persons who are directly affected and who were not made parties are the ones to pursue the appeal in order for the caveat of the **Cleveland Firefighters** case to have vitality and meaning.

CONCLUSION: THE MARINO COMPLAINT SHOULD NOT HAVE BEEN DISMISSED AS AN IMPERMISSIBLE COLLATERAL ATTACK AND THE COSTELLO APPEAL SHOULD NOT HAVE BEEN DISMISSED. THE JUDGMENTS BELOW SHOULD BE REVERSED.

Respectfully Submitted:



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AMICUS CURIAE

BRIEF

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No. 86-1415

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

EVELYN MARINO, *et al.*,
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v.
JUAN U. ORTIZ, *et al.*,
Respondents.

WAYNE COSTELLO, *et al.*,
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v.
THE NEW YORK CITY POLICE DEPARTMENT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS' ASSOCIATION, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Pursuant to Rule 36.3 of the Rules of this Court, *amici* respectfully move the Court for leave to file the attached brief *amicus curiae* in support of respondents.

Respondents have consented to the filing of the brief. This motion is made necessary by the failure of petitioners' counsel to respond to *amici*'s requests for consent.

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. *Amici* thus have a vital interest in the legal issues that affect the powers and responsibilities of state and local governments.

This case involves a collateral attack on actions taken by the City of New York pursuant to a consent decree entered in a Title VII class action.[1] Although petitioners had actual notice of the underlying Title VII lawsuit before the consent decree was filed and believed that their interests might be prejudiced by the implementation of the decree, they chose not to intervene. Instead, they filed a separate lawsuit challenging the City's action. Eventually, petitioners also filed objections to the proposed consent decree, but they rejected the City's suggestion that they intervene in the Title VII litigation. Petitioners now ask this Court to rule that they may either appeal from the consent decree entered in the action in which they declined to intervene or pursue a collateral attack on actions taken pursuant to the consent decree.

Should petitioners' collateral attack be permitted to proceed, state and local governments sued as employers under Title VII could not confidently negotiate consent decrees because a decision to remedy past discrimination could subject them to claims from each non-minority employee for the same relief. Government personnel practices thus would remain in a state of flux. The inevitable effect would be to discourage public employers from entering into settlements of Title VII litigation, and to frustrate Congress's preference for voluntary compliance with Title VII. *See Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 106 S. Ct. 3063 (1986).

Moreover, petitioners' contentions would undermine the goals served by according finality to judgments. State and local governments defending Title VII suits would be exposed to a multiplicity of actions, which could waste judicial resources, impair public services, and lead to inconsistent decisions.

Finally, *amici* are concerned about the implications of petitioners' arguments for the full faith and credit constitutionally accorded to the judgments of state courts. If a federal court must entertain a collateral challenge to another federal court judgment, state court judgments similarly may be exposed to attack.

Because of the importance of the issues in this case to state and local governments, *amici* seek leave to file this brief in order to assist the Court in its resolution of the issues.

Respectfully submitted,

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[1] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

QUESTIONS PRESENTED

1. Whether individuals who had notice of and an opportunity to intervene in an ongoing Title VII class action may file a collateral attack challenging actions taken pursuant to a consent decree entered in the Title VII action.

2. Whether individuals who object to a Title VII consent decree but refuse to intervene in the action may appeal from entry of the decree.*

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* As noted below, *amici* do not address directly the second question presented by the petition, but rather incorporate by reference the arguments of respondents and the Solicitor General on that issue.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1415

EVELYN MARINO, *et al.*,
Petitioners,
v.
JUAN U. ORTIZ, *et al.*,
Respondents.

WAYNE COSTELLO, *et al.*,
Petitioners,
v.
THE NEW YORK CITY POLICE DEPARTMENT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS' ASSOCIATION, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

The interest of the *amici* is set forth in the motion accompanying this brief.

STATEMENT

This case involves the interaction of three lawsuits. The plaintiffs in the first two cases, *Hispanic Society v. New York City Police Dep't* and *Guardians Association v. City of New York* (collectively, the *Hispanic Society* litigation), alleged that a civil service examination used by the City of New York for promoting police officers to

the rank of sergeant had a disparate impact on black and Hispanic candidates in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.* (Pet. App. A3, A60-A61; J.A. 11-32).[1] These class actions, which were consolidated (Pet. App. A3), were settled by a consent decree that was provisionally approved in November 1985 (*id.* at A84-A85), and finally approved after notice was served on all parties and posted in all precincts (J.A. 84) and a fairness hearing was held in April 1986 (Pet. App. A64-A65). The consent decree provided that all officers whose examination scores exceeded the original cutoff score would be promoted to sergeant, and that additional black and Hispanic candidates would be added in order of their scores until the racial and ethnic composition of the newly promoted sergeants approximated that of the candidates taking the test (J.A. 70-75).

Three groups successfully intervened in the *Hispanic Society* litigation: the Sergeants Benevolent Association (SBA), which represented officers who had been appointed as sergeants, the Sergeants Eligible Association (SEA), which represented officers who were on the eligible list but had not received appointment, and the so-called "Schneider intervenors," who represented various white ethnic societies and individual officers (Pet. App. A4, A61-A62, A81). The SBA and the SEA signed the consent decree, while the Schneider intervenors objected to it (*id.* at A4-A5, A61-A64).

Petitioners in this case represent certain non-minority officers who were not promoted because their scores did not exceed the original cutoff score, even though they scored higher than certain blacks and Hispanics who were promoted pursuant to the consent decree (Pet. App. A7-A8). Petitioners filed the third case, *Marino v. Ortiz*, after the consent decree was provisionally approved but before the fairness hearing was held and the decree was finally entered (*id.* at A7). Petitioners argued that it

[1] "Pet. App." refers to the Appendix to the Petition for a Writ of Certiorari. "J.A." refers to the Joint Appendix.

was a denial of equal protection to permit minority officers to be promoted over white officers who scored higher on the examination (*id.* at A7-A8).

On motion of the New York City Police Department (NYPD),[2] the *Marino* case was reassigned to the district judge handling the *Hispanic Society* litigation. NYPD then moved to dismiss *Marino* as an impermissible collateral attack on the interim settlement orders entered in the *Hispanic Society* litigation (Pet. App. A30-A38). NYPD urged the district court to direct petitioners to seek intervention in the *Hispanic Society* litigation or to file objections to the consent decree (*id.* at A37-A38). Although petitioners ultimately filed objections in the *Hispanic Society* litigation (*id.* at A64-A65), they refused to intervene in that action (*id.* at A12).

The district court dismissed *Marino* on the ground that it was an impermissible collateral attack on the consent decree (Pet. App. A12-A13). The court then reviewed petitioners' objections to the consent decree, found them to be without merit, and finally approved the decree (*id.* at A93-A99). Petitioners appealed both orders (*id.* at A2, A65-A66).

The United States Court of Appeals for the Second Circuit agreed that *Marino* was an impermissible collateral attack and affirmed the dismissal of that lawsuit (Pet. App. A8-A13). The court dismissed petitioners' attempted appeal in the *Hispanic Society* litigation because petitioners never moved to intervene in the proceedings and, therefore, were not parties to the litigation (*id.* at A66-A78). On May 18, 1987, this Court granted the petition for a writ of certiorari and, by order of June 8, 1987, limited its review to the court of appeals' procedural holdings.

[2] The NYPD and various officials were defendants in the *Hispanic Society* litigation (Pet. App. A3; J.A. 87-91). Various city officials were defendants in *Marino* (Pet. App. A3, A60-A61). For convenience, the NYPD will be termed the defendant in all three cases.

SUMMARY OF ARGUMENT

A. This case presents the question whether a consent decree in a Title VII suit against a public employer is vulnerable to collateral attack by non-minority employees who forgo their opportunity to intervene in the Title VII lawsuit. *Amici* submit that permitting such collateral attacks would undermine both the congressional policy of encouraging voluntary settlement of Title VII litigation and the public interest in the finality of judgments.

The interest in remedying discrimination through voluntary compliance has been repeatedly recognized as an important public policy. That policy would be seriously compromised if a negotiated settlement were subject to repeated challenge and dilution. Minority employees would be unlikely to enter into consent decrees that could be eroded by subsequent collateral attacks. Public employers similarly would be reluctant to enter into consent decrees if they could not thereby avoid exposure to the burden, expense, and uncertainty of continued litigation.

Permitting collateral attacks on consent decrees also runs counter to the well-established public interest in the finality of judgments and its attendant goals of conserving judicial resources and minimizing the risk of inconsistent orders. The interest in finality is intensified when the Title VII defendant is a government, and uncertainty in employment practices jeopardizes the delivery of essential public services.

Petitioners' alternative to collateral attacks, mandatory joinder of all non-minority employees, would also adversely affect the interest in remedying discrimination. Not only would the procedure be so burdensome as to discourage minorities from pressing their claims, but the practical difficulties in administering mandatory joinder would hamper settlement efforts.

The interests of the parties and the public are best served by requiring Title VII litigants to give notice of a

proposed consent decree to all potentially affected employees and to permit non-parties to intervene in the Title VII litigation if they wish to contest the decree.

B. This Court should reject the petitioners' suggestion that collateral attacks on consent decrees entered in Title VII actions can be avoided only by mandatory joinder as parties, under Rule 19 of the Federal Rules of Civil Procedure, of all persons whose interests may be affected by the relief ultimately awarded. Rule 19 was never intended to control in this situation.

A rule requiring the joinder in Title VII actions of every coworker who conceivably might have an interest in, or an objection to, a proposed consent decree would impose a prohibitively costly and senseless burden on the parties and the courts. Moreover, mandatory joinder is inappropriate where non-parties can protect their interests by intervening under Rule 24. The admonition of Rule 1, that the Federal Rules are to be construed to secure the just, speedy, and inexpensive determination of every action, provides a strong basis for this Court to refuse to hold that all non-minority employees must be joined as parties every time a minority employee challenges an employment practice.

C. Collateral attacks on Title VII consent decrees should be precluded where the non-party plaintiff was afforded notice and a meaningful opportunity to intervene. Such a prohibition is entirely consistent with this Court's decisions concerning collateral estoppel. As this Court and the lower courts have acknowledged, an interested non-party who deliberately bypasses the opportunity to participate in a lawsuit may be bound by its results.

In the context of Title VII litigation, notice of a proposed consent decree that is posted in a conspicuous location in the workplace is reasonably certain to inform all employees that their interests may be affected. Moreover, the criteria for intervention under Rule 24 afford

interested non-parties a meaningful opportunity to challenge the proposed decree.

It is undisputed that petitioners had ample actual notice of the proposed consent decree in the *Hispanic Society* litigation. They launched their collateral attack even before the hearing was scheduled to determine whether the decree should be finally approved. Indeed, they presented their objections to the decree at that hearing, while deliberately refusing to intervene as parties. They preferred to sit on the sidelines, and to select a different forum to challenge the result. In these circumstances, the courts below correctly dismissed their collateral challenge.[3]

ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD THAT PERSONS WHO HAVE NOTICE OF A PROPOSED CONSENT DECREE IN A TITLE VII ACTION AND DO NOT INTERVENE IN THAT LAWSUIT MAY NOT FILE A SEPARATE LAWSUIT ATTACKING THE DECREE.

In this case, the Court must decide whether a non-minority employee may bypass the opportunity to intervene in a Title VII lawsuit to challenge a proposed consent decree, and instead file a separate action to relitigate the validity of the decree. The question requires the Court to consider several competing claims. Minority employees press their interest in remedying the disparate impact resulting from a promotion examination, while non-minority employees resist an attempt to correct past discrimination by granting compensatory benefits only to

[3] The petition also presents a second question, *viz.*, whether individuals who object to a Title VII consent decree but refuse to intervene in the action may appeal from entry of the decree. Petitioners' *amicus*, the Solicitor General, has answered that question in the negative (Br. 26-30). For the reasons stated by both the Solicitor General and respondents, *amici* urge affirmance of the dismissal of petitioners' appeal in the *Hispanic Society* litigation.

current minority employees. These private concerns must be evaluated in light of the public's dual interest in voluntary eradication of discrimination and in achieving a prompt and final resolution of the claims so that the City's mission of public service and protection will not be impeded by uncertainty and the costs and burdens of continued litigation.

Petitioners argue that a collateral attack on a Title VII consent decree may be launched by any dissatisfied employee who has not been joined as a party to the action. Petitioners' proposed mandatory joinder rule would be unworkable as a practical matter, and would impose an unacceptable burden on minority employees challenging discrimination and on employers seeking to provide a remedy. The proposal would undermine both the congressional policy of remedying discrimination through voluntary compliance with Title VII, and the public interest in the finality of judgments. The rights of all concerned can be accommodated, however, if the parties to a consent decree are required to give notice of the decree to all potentially affected non-minority employees and if those employees are permitted to intervene in the Title VII action if they wish to contest the decree.

A. The Related Interests In Remedying Discrimination And In Finality Are Substantially Undermined By Collateral Attacks On Consent Decrees In Title VII Actions.

This Court has "on numerous occasions recognized that Congress intended for voluntary compliance to be the preferred means of achieving the objectives of Title VII." *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 106 S. Ct. 3063, 3072 (1986). In *W.R. Grace & Co. v. Local Union 759, Rubber Workers*, 461 U.S. 757, 770 (1983), for example, the Court noted that "[v]oluntary compliance with Title VII . . . is an important public policy." *See also Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1457 (1987); *Alexander v. Gardner-Denver*

Co., 415 U.S. 36, 44 (1974). As the commentators have recognized, voluntary compliance with Title VII is the most effective means of attaining the statute's goal of eradicating discrimination:

> A remedy designed to reform the workings of a large organization is most effective when the organization cooperates in carrying out the remedy, and the human beings who make up an institution are more apt to cooperate in carrying out a negotiated scheme than in complying with an order imposed from above by a court.

Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 Duke L.J. 887, 899 (1984) (Schwarzschild).

Closely akin to the interest in remedying discrimination is the interest shared by the public, the employer, and the minority employees in finality. This Court frequently has acknowledged that according finality to judgments serves the important goals of conserving judicial resources, preventing costly and vexatious multiple lawsuits, and minimizing the risk of inconsistent decisions. *See University of Tennessee v. Elliott*, 106 S. Ct. 3220, 3226 (1986); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 466 n.6 (1982); *Montana v. United States*, 440 U.S. 147, 153-54 (1979). *See also United States v. Yonkers Bd. of Educ.*, 801 F.2d 593, 596 (2d Cir. 1986).

In this regard, state and local governments and the citizens they serve have an especially significant concern because of the need for uninterrupted delivery of basic services, such as police and fire protection. That vital interest would be seriously endangered if government employment practices remained in a state of uncertainty and flux because of the possibility of repeated attacks. A City's inability to make timely employment decisions could well cause personnel shortages that would threaten public safety (J.A. 147-48, 160).

Minority employees in Title VII suits also have an interest in ensuring that a consent decree is accorded finality. Title VII plaintiffs who agree to a settlement do so as a compromise, relinquishing their opportunity for a broader remedy in order to ensure some effective relief (*see* Schwarzschild, *supra*, at 909). Accommodating nonminority employees in collateral suits would dilute the remedy for which Title VII plaintiffs had bargained in good faith. In this case, for example, the relief petitioners seek would reduce the negotiated percentage of minorities receiving promotions by virtue of the consent decree. Minority employees would be subjected to substantial uncertainty and excessive expense in order to protect the remedy previously achieved. Finality thus is basic to safeguarding the integrity of the settlement process.

Similarly, basic principles of fairness are violated by permitting collateral attacks on consent decrees by persons who deliberately bypass the opportunity to participate in the ongoing Title VII lawsuit. Persons who, for tactical reasons, choose not to intervene in litigation, but rather sit on the sidelines and await resolution of the lawsuit, should not be permitted to relitigate the same issue if the lawsuit is not resolved to their satisfaction.

The interests in remedying discrimination and in finality are both substantially undermined by the procedural methods on which petitioners rely for litigating their claims. Permitting collateral attacks on consent decrees would burden the courts with disputes that could delay indefinitely the final resolution of important civil rights claims. In view of the large number of police officers potentially affected by this case, there is an almost limitless supply of possible plaintiffs that might bring subsequent collateral attacks. Indeed, it is virtually certain, from the nature of an employment discrimination case, that at least one person may wish to object to any specific remedy that is devised. *See* Schwarzschild, *supra*, at 928. It requires no stretch of

the imagination to foresee that one group of objectors that succeeds in altering the original terms of a Title VII consent decree will be followed by another wave of objectors wishing to challenge the terms of the subsequent relief. *Cf. United States v. Yonkers Bd. of Educ.*, 801 F.2d at 596. Allowing collateral challenges to Title VII consent decrees thus could unfairly subject parties to endless litigation and lead to the waste of precious judicial resources. *See Thaggard v. City of Jackson*, 687 F.2d 66 (5th Cir. 1982), *cert. denied sub nom. Ashley v. City of Jackson*, 464 U.S. 900 (1983); *Hefner v. New Orleans Public Serv., Inc.*, 605 F.2d 893 (5th Cir. 1979), *cert. denied*, 445 U.S. 955 (1980); *Prate v. Freedman*, 430 F. Supp. 1373 (W.D.N.Y.), *aff'd mem.*, 573 F.2d 1294 (2d Cir. 1977), *cert. denied*, 436 U.S. 922 (1978).

Moreover, permitting collateral attacks on consent decrees could place the employer in the unenviable position of attempting to comply with contradictory or inconsistent orders.

> The Department would in effect be forced to walk a tightrope. If it refused to enter into the consent decree, it would be potentially liable to the [minority employees]. If it did enter into the agreement, it would be subject to suits for compensation by non-minority employees. *Cf. United Steelworkers v. Weber*, 443 U.S. 193, 209, 99 S.Ct. 2721, 2730, 61 L.Ed. 2d 480 (1979) (Blackmun, J., concurring).

Dennison v. City of Los Angeles Dep't of Water & Power, 658 F.2d 694, 696 (9th Cir. 1981). The resulting additional costs would loom large for many state and local governments already hard-pressed to finance essential services. *Id.* at 695-96. Thus, only if Title VII consent decrees are accorded finality will employers and employees alike have sufficient incentives to enter into voluntary settlements as workable alternatives to protracted and costly litigation.[4]

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[4] *W.R. Grace*, 461 U.S. 757, is not to the contrary. *W.R. Grace* involved employees who had enforceable seniority rights under a collective bargaining agreement. Those rights were infringed by a Title VII conciliation agreement. This Court permitted the union to enforce its pre-existing rights despite the strong interest in voluntary compliance with Title VII. This case is fundamentally distinguishable from *W.R. Grace*. First, this case does not involve conflicting agreements entered into by an employer. *See* J.A. 106 (affidavit of Vice President of SBA, stating that nothing in the settlement is contrary to or inconsistent with its collective bargaining agreement with NYPD). Second, unlike the independent contractual rights asserted by the plaintiffs in *W.R. Grace*, the rights alleged by petitioners in this case stem solely from the consent decree.

Finally, the interest in remedying discrimination is ill-served by the other procedural device suggested by petitioners—mandatory joinder—a procedure that would vastly complicate the settlement process (see pages 12-15, *infra*). Indeed, the costs associated with joinder might well prevent the assertion of meritorious claims of discrimination.

The procedure adopted, of course, must "not unnecessarily trammel the interests of the white employees." *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979). That interest is narrowly limited to assuring that any Title VII remedy is not broader than is necessary to eradicate the present effects of past discrimination. *See Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, supra*; *Johnson v. Transportation Agency, supra*.[5]

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[5] Indeed, several lower courts have refused to acknowledge any interest in the non-minority employee on the ground that there is no legally cognizable interest in defending a discriminatory system. *See, e.g., Grann v. City of Madison*, 738 F.2d 786, 794-95 (7th Cir.), *cert. denied*, 469 U.S. 918 (1984); *Kirkland v. New York State Dep't of Correctional Servs.*, 711 F.2d 1117, 1126 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984); *Stotts v. Memphis Fire Dep't*, 679 F.2d 541, 558 (6th Cir. 1982), *rev'd on other grounds sub nom. Firefighters v. Stotts*, 467 U.S. 561 (1984); *Dennison v. City of Los Angeles Dep't of Water & Power, supra; EEOC v. McCall Printing Corp.*, 633 F.2d 1232 (6th Cir. 1980); *Freeze v. ARO, Inc.*, 503 F. Supp. 1045, 1047 (E.D. Tenn. 1980).

The limited nature of the non-minority employees' interest is plain from the fact that their cause of action is not an independent one, but rather arises solely out of the employer's court-approved agreement to eradicate a discriminatory practice. In this case, for example, petitioners, who failed to achieve the cut-off score in the examination, had no pre-existing rights that could be impaired by the relief provided by the consent decree. The relief they seek is expansion of the consent decree to provide for their own promotions.[6]

As shown in Part C below, the non-minority employees' narrow interest can readily be accommodated by affording them notice and an opportunity to intervene in the underlying Title VII action. Their interest, therefore, does not warrant a rule that would undermine the interests in finality and in remedying discrimination, while unduly burdening the courts, the parties, and the public.

B. Requiring Joinder Of All Potentially Interested Parties Is An Unsound Alternative To Voluntary Intervention.

As the foregoing discussion indicates, the procedures used to resolve Title VII claims can substantially affect the interests at stake. Petitioners have argued that the proper means of resolving the claims is to require joinder as parties under Rule 19 of the Federal Rules of Civil Procedure of every public employee who might conceivably have an interest in, or objection to, the consent de-

[6] The situation of petitioners thus differs significantly from that of a plaintiff whose complaint is directed at conditions that exist separate and apart from a decree. Non-parties who have an independent cause of action will not be affected by a rule precluding collateral attack; only those whose claims arise from the decree itself would be barred. The concern raised by two members of the Court in *Ashley v. City of Jackson*, 464 U.S. 900 (1983) (Rehnquist and Brennan, JJ., dissenting from denial of petition for certiorari), that non-parties should not be precluded from bringing actions to assert pre-existing rights against entities operating under a consent decree, thus is not implicated by this case.

cree. This procedure would place a senseless burden on the parties and the courts, and would be inconsistent with the established scope of Rule 19.

Rule 19 must be read in conjunction with the other federal rules and should not be strained to accommodate interests better protected by other rules. The *Advisory Committee's Note to Rule 19* (*reprinted in* 39 F.R.D. 89, 92 (1966)) recognizes this principle in the drafters' admonition that cases should not be dismissed for failure to join a necessary party if the prejudice from non-joinder could be averted through intervention under Rule 24. Moreover, Rule 1's instruction that the rules are to be construed to secure the just, speedy, and inexpensive determination of every action provides a strong basis for this Court to rule that minorities who challenge employment practices need not join every non-minority employee and that, instead, non-minority employees who perceive a threat to their rights should be given notice and permitted to intervene.

1. Mandatory joinder imposes excessive burdens on the parties and the courts and, in any event, is unworkable.

Although petitioners and the United States propose joinder under Rule 19 as a means of accommodating the interests identified in the preceding section, there is little doubt that such a procedure is unworkable.[7] By contrast to intervention, where the employees themselves decide

[7] If joinder were required and a plaintiff did not join all co-workers, defendants could move for dismissal under Rule 19. *See, e.g., Tewa Tesuque v. Morton*, 498 F.2d 240 (10th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); *Powers v. Mitchell*, 463 F.2d 212 (9th Cir.), *cert. denied*, 409 U.S. 967 (1972); *Haas v. Jefferson Nat'l Bank*, 442 F.2d 394 (5th Cir. 1971); *American Optical Co. v. Curtiss*, 59 F.R.D. 644 (S.D.N.Y. 1973). *See generally* 7 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure*: Civil 2d § 1611 at 169 (1986) ("[i]f the court concludes that the action should not go forward without a person described in Rule 19(a) after a careful consideration of the factors listed in subdivision (b), the absentee is then regarded as indispensable and the action typically will be dismissed").

whether they have interests that need protection, mandatory joinder would require the plaintiff to identify at the initial stages of the lawsuit all persons who might be affected by any form of relief ultimately afforded. The difficulty and uncertainty inherent in such an undertaking are manifest. For example, if minorities challenged the employment practices at a headquarters office, would they have to join all employees in the branch office? If a complaint alleged sex discrimination, would only the male coworkers be required to be joined or would other female employees also have to be included?

A requirement that all non-minority coworkers be joined would increase tremendously the cost and administrative burden of every lawsuit. More than 11,000 police officers took the examination that was the subject of the underlying Title VII action, and nearly 80 percent of them were white (Pet. App. A3-A4; A60). The mandatory joinder rule urged by petitioners would require that each of those officers be made a party to the Title VII lawsuit and listed as a defendant in the pleadings. Not only would service of process have to be made on each coworker, but the expense of duplicating the pleadings alone could be staggering. Nor would the cost and burden be limited to the Title VII plaintiff. Coworkers named as defendants might feel compelled to hire counsel, answer the complaint, and participate in depositions and trials, even though they may not be concerned with the relief ultimately awarded.[8]

Comparable questions of manageability for the courts would be presented. The participation of numerous attorneys filing motions and seeking hearings would vastly

[8] The potential liability for these joined defendants could also be problematic. If the minority employee prevailed, would the joined coworker who filed a motion or participated in a deposition be required to contribute to any fees awarded? Would the substantial additional duplication and other litigation costs be borne by a defendant who had no control over the joined parties' actions, by the joined parties themselves, or by the plaintiffs?

complicate Title VII proceedings. In addition, if defendant classes could be ordered, they would be difficult to administer.[9]

Finally, all of this burden and expense would accomplish little in the way of furthering the interests of non-minority employees. The vast majority of coworkers may be uninterested in contesting a consent decree, and the interests of the rest could be effectively represented by a group that was sufficiently motivated to intervene. Indeed, in the *Hispanic Society* litigation, the plaintiffs and the City may justifiably have assumed that the interests asserted by petitioners were adequately represented by the existing intervenors. In particular, the Schneider intervenors represented non-minority police officers who, like petitioners, had neither been promoted nor placed on the eligible list following the challenged examination. In this situation, there can be no presumption that all 11,000 officers would be sufficiently concerned about the outcome of the lawsuit to require their joinder. Rather, the presumption should be that, given adequate notice, the few who wish to press their case will intervene.

2. *Rule 19 was never intended to control and does not, as a practical matter, resolve the issue of collateral attacks on consent decrees.*

Although the list of problems noted in the foregoing section is not exhaustive, these examples demonstrate that Rule 19 was never intended to accommodate the various interests presented in a public employment discrimination case. Indeed, to expand Rule 19 to require the joinder of all parties who might be affected if a certain

[9] Practical problems would be presented if a defendant class were ordered. Under Rule 23, class members have the right to opt out of the class. If any joined defendant decided to exercise that option, the collateral attack issue would remain. In addition, class members often share proportionately the costs incurred. For the vast number of non-minority employees who would not otherwise challenge the City's action, imposition of such costs, simply because of their status as public employees, would be an unjustifiable burden.

remedy were ordered would stand on its head Rule 1's admonition that the Federal Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."

The courts have declined to order joinder in situations where non-parties could intervene to protect their own rights.[10] In *Atkinson v. Owens-Illinois, Inc.*, 9 Empl. Prac. Dec. (CCH) ¶ 10,155 (N.D. Ga. 1975), for example, the employer moved to dismiss a Title VII complaint alleging sex discrimination, on the ground that the female plaintiffs had failed to join as necessary party defendants the individual male employees "whose employment rights and opportunities may be adversely affected by the relief sought by the plaintiffs." *Id.* at 7704. The district court declined to order joinder, observing that "Rule 19(a) does not require joinder in every case in which 'interests' of male employees may be adversely affected by a court decree terminating employment practices which discriminate against women." *Id.* The court continued: "If, of course, the male employees should at any time feel that their interests risk serious impairment in this litigation, they may seek to intervene pursuant to Rule 24, Fed. R. Civ. P." *Id.* *See also Arthur v. Starrett City Assocs.*, 89 F.R.D. 542, 548 (E.D.N.Y. 1981) (even assuming HUD has an "interest", it could protect its interest by seeking to intervene or by filing an *amicus* brief; *Smith v. B & O R. Co.*, 473 F. Supp. 572, 584 (D. Md. 1979) (where litigation was a matter of common knowledge among nonparties, and they could attempt to intervene, their failure to do so tended to "indicate that they do not feel that their interests are being threatened by this lawsuit"). The Advisory Committee itself acknowledged that "the absentee

[10] Indeed, there is substantial doubt whether the narrow interest of non-minority employees in assuring that a consent decree is not unreasonably broad rises to the level of an interest protected under Rule 19. *Cf. Potter v. Continental Trailways, Inc.*, 480 F. Supp. 207, 212-213 (D. Colo. 1979); *Spirt v. Teachers Ins. & Annuity Ass'n*, 416 F. Supp. 1019 (S.D.N.Y. 1976).

may sometimes be able to avert prejudice to himself by voluntarily appearing in the action or intervening on an ancillary basis. . . . The court should consider whether this, in turn, would impose undue hardship on the absentee." *Advisory Committee's Note to Rule 19*, 39 F.R.D. at 92.[11]

Other courts have refused to order joinder where the litigation seeks the vindication of a public right. *Kirkland v. New York State Dep't of Correctional Servs.*, 520 F.2d 420 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976); *see also Jeffries v. Georgia Residential Fin. Auth.*, 678 F.2d 919, 929 (11th Cir.), *cert. denied*, 459 U.S. 971 (1982); *PepsiCo, Inc. v. FTC*, 472 F.2d 179, 187-88 & n.10 (2d Cir. 1972), *cert. denied*, 414 U.S. 876 (1973); *Coalition on Sensible Transp., Inc. v. Dole*, 631 F. Supp. 1382, 1387 (D.D.C. 1986); *Louisiana v. Lee*, 596 F. Supp. 645, 651 (E.D. La. 1984), *vacated on other grounds and remanded*, 758 F.2d 1081 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1259 (1986); *Sansom Comm. v. Lynn*, 366 F. Supp. 1271, 1280-81 (E.D. Pa. 1973).

As the court observed in *Sierra Club v. Watt*, 608 F. Supp. 305 (E.D. Cal. 1985), this "public interest exception" effectuates Rule 19's requirement that a court must consider "whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." *Id.* at 325. Referring to Rule 1's mandate that the Federal Rules "shall be construed to secure the just, speedy and inexpensive determination of every action," the court explained:

[11] Although some of this authority construes Rule 19(b), which requires the court to determine whether dismissal is warranted where joinder allegedly is not feasible, the same standard should be applied here. Because joinder of large numbers of coworkers is not sensible, even if it may technically be possible (see discussion at pages 12-15, *supra*), the heightened scrutiny courts apply under Rule 19(b) also should be applied in this situation.

> Surely justice cannot be done if public interest litigation is precluded by virtue of the requirements of joinder. Inevitably, the joinder of the large number of persons who could potentially be affected by public interest litigation, even if possible, is not feasible and certainly is not inexpensive. In sum, then, the public interest exception is supported by both [R]ule 19 itself and [R]ule 1, and just makes good sense.

Id.

Both lines of cases confirm that the procedural problems presented by Title VII litigation are not resolved by reference to Rule 19. A requirement that minority employees join as defendants every coworker whose interests might conceivably be affected by an eventual consent decree would be so burdensome as to render Title VII litigation impractical. In view of the eminently workable alternative of intervention, a mandatory joinder rule should not be imposed.[12]

C. A Rule That Prohibits Collateral Attack By Parties That Have Been Given Notice And An Opportunity To Intervene Best Protects The Rights Of All Concerned.

The majority of courts that have considered the question have prohibited collateral attacks on consent decrees in Title VII actions.[13] Although these courts have not

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[12] Even if petitioners had been joined in the *Hispanic Society* litigation, they would not have had the power to block the consent decree merely by withholding their consent to it. *See Local No. 93, Int'l Ass'n of Firefighters*, 106 S. Ct. at 3079. Thus, by considering petitioners' objections to the proposed consent decree, the district court afforded petitioners "all the process that [] was due [them under Title VII]." *Id., quoting Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 400 (1982).

[13] *Thaggard v. City of Jackson*, 687 F.2d 66 (5th Cir. 1982), *cert. denied*, 464 U.S. 900 (1983); *Dennison v. City of Los Angeles Dep't of Water & Power, supra*; *Black & White Children v. School Dist.*, 464 F.2d 1030 (6th Cir. 1972); *Austin v. County of DeKalb*, 572 F. Supp. 479 (N.D. Ga. 1983); *Prate v. Freedman, supra*;

always articulated the theoretical basis for their holdings, this Court's prior collateral estoppel decisions provide a sound rationale for the results they reached. Because collateral estoppel applies only where adequate procedural safeguards have been employed, the interests of non-minority employees would be protected. In this case, where petitioners were actually in court and participated in the proceedings, but made a deliberate decision not to intervene, the judgment of the court of appeals should be upheld because petitioners' rights were fully protected.

1. *The holding of the court of appeals, which is the majority rule, is consistent with this Court's prior decisions concerning collateral estoppel.*

In *Dennison v. City of Los Angeles, supra*, the court of appeals identified the policies underlying the preclusion of collateral attacks on consent decrees in Title VII actions. That case was brought against an employer on behalf of non-minority employees who were allegedly denied promotions as the result of an affirmative action program established under a consent decree. Although the plaintiffs, like petitioners here, purported not to challenge the validity of the decree, but claimed only that they should receive similar benefits, the court of appeals held that the action was "substantively" an impermissible collateral attack. The court reasoned that permitting the suit "would be inimical to the policy underlying Title VII of promoting settlements" and would unnecessarily subject the employer to multiple lawsuits. 658 F.2d at 696.[14]

O'Burn v. Shapp, 70 F.R.D. 549 (E.D. Pa.), *aff'd mem.*, 546 F.2d 418 (3d Cir. 1976), *cert. denied*, 430 U.S. 968 (1977); *Indiana Public Interest Research Group v. City of Bloomington*, 501 N.E.2d 476 (Ind. App. 1986).

[14] Petitioners make three arguments in support of their claim that their lawsuit was not a collateral attack on the consent decree. First, they argue that because a final judgment had not been entered at the time they filed their action, their lawsuit cannot be considered an attack on a *judgment* (Pet. Br. 16-17). Petitioners' challenge is directed at an order in the underlying lawsuit, which

The implicit basis for the *Dennison* line of cases (*see* note 13, *supra*) is the doctrine of collateral estoppel.[15]

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provided the predicate for the final consent decree. Petitioners' claim, if granted, would undermine the interim order and, thus, the final judgment. *Cf. Hays v. McMillan*, 418 F. Supp. 116 (N.D. Tex. 1976), *aff'd*, 560 F.2d 204 (5th Cir. 1977) (collateral attack on preliminary injunction barred); *United States v. City of Chicago*, 395 F. Supp. 329 (N.D. Ill.) (same), *aff'd*, 525 F.2d 695 (7th Cir. 1975).

Second, petitioners argue that their challenge is not a *collateral* attack because their claims were asserted before the same district judge who presided over entry of the consent decree (Pet. Br. 16-17, 58). Transfer of the case was the result of the efforts of the NYPD (J.A. 90-91). Moreover, the mere fact that petitioners' case came before the same judge would not preclude inconsistent orders or constant renegotiation of the consent decree by minority employees to assure that their percentage in the relevant workforce remained constant. *See Black & White Children v. School Dist., supra.*

Finally, petitioners contend that their claim is not an *attack* because the NYPD could have complied with the consent order while affording petitioners the relief they requested (Pet. Br. 29-30). That argument is wholly without merit. The consent decree was designed to assure that a certain percentage of the officers becoming sergeants as a result of the challenged examination would be black or Hispanic. If petitioners were added to the list, it would significantly reduce the percentage of minorities promoted and, thus, contravene the decree. In addition, as the *Dennison* court held:

> Awarding compensatory relief to the non-minority employees would impose conflicting or inconsistent obligations on the Department. Each time the Department attempted to comply with the affirmative action program by promoting a minority employee, it would have to give an equivalent amount of compensation to a non-minority employee who would have been promoted but for the consent decree. That extra compensation would drastically increase the cost of each promotion and would burden the Department for complying with the consent decree. The decree established who was entitled to promotion, and the present action indirectly seeks to confer the benefits of promotion on others. The relief sought in the present action is accordingly in conflict with the decree.

658 F.2d at 695-96.

[15] Consent decrees generally do not contain an admission of wrongdoing and thus there can be no collateral estoppel effect

Although collateral estoppel initially applied only to parties or their privies, the doctrine has been expanded. A review of cases in which persons other than parties to the original proceeding have been held bound by collateral estoppel demonstrates that the Court has anticipated application of the doctrine in circumstances like those presented here.

In the *Penn-Central Merger & N & W Inclusion Cases*, 389 U.S. 486 (1968), certain parties objected to a railroad merger and filed suit in Pennsylvania. The Pennsylvania action was stayed while a similar New York lawsuit by other parties raising the same issues was litigated. This Court concluded that the litigant had had an adequate opportunity to intervene in the New York action and thus his claim was barred by the prior adjudication. *Id.* at 505-06. Two weeks later, the Court decided *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968), in which it suggested that a nonparty might be bound by a previous decision if he "purposely bypassed an adequate opportunity to intervene." *Id.* at 114. *See also Montana v. United States*, 440 U.S. at 155 ("although not a party, the United States plainly had a sufficient 'laboring oar' in the conduct of [the prior] litigation to actuate principles of estoppel").

The lower courts have relied on these decisions to prohibit collateral attacks on consent decrees by parties that intentionally refrained from exercising the opportunity to participate in the underlying lawsuit. For example, in *National Wildlife Fed'n v. Gorsuch*, 744 F.2d 963, 968-69 (3d Cir. 1984), the court held that the National Wildlife Federation could not collaterally attack a consent decree entered in an action in which it deliberately had not intervened.

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concerning liability. However, in order to approve the decree, the court must find that it is legal and fair. *See Kirkland v. New York State Dep't of Correctional Servs.*, 711 F.2d at 1129. *See also Firefighters v. City of Cleveland, supra.* It is this finding to which collateral estoppel attaches.

> Clearly, plaintiffs were not outsiders unaware of litigation in progress that would ultimately affect their interests. In a deliberate choice of litigation strategy, they chose to stand on the sidelines, wary but not active, deeply interested, but of their own volition not participants. Although plaintiffs may not have had their day in court as litigants, they had the opportunity and for reasons of their own adopted a different approach. Plaintiffs cannot, at this stage, assert persuasively that the interest of finality should not prevail.

Id. at 971-72. *Accord, Lynch v. Merrell-National Laboratories*, 646 F. Supp. 856, 860 (D. Mass. 1986). *See also Safir v. Dole*, 718 F.2d 475, 483 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1206 (1984); *Society Hill Civic Ass'n v. Harris*, 632 F.2d 1045, 1052 (3d Cir. 1980); *Adams v. Bell*, 711 F.2d 161, 168-70 (D.C. Cir. 1983) (en banc), *cert. denied*, 465 U.S. 1021 (1984).

The consistent theme underlying these decisions is fairness. It is unfair for persons who have notice of an action in which they have an interest and are afforded an opportunity to intervene, to sit on the sidelines and await the outcome of the action before filing their own suit. In this case, petitioners were well aware of the *Hispanic Society* litigation and were deeply interested in its outcome. Indeed, they actually filed objections to the consent decree. They nevertheless chose not to become parties in that action and instead filed a separate lawsuit attacking the City's actions under the consent decree. Even after respondents had urged petitioners to intervene, they refused. Because petitioners had an opportunity to intervene and present their claims, they "cannot, at this stage, assert persuasively that the interest of finality should not prevail." *National Wildlife Fed'n v. Gorsuch*, 744 F.2d at 972.

This principle applies with particular force in a situation, like this action, in which petitioners' claims arise solely out of the court-authorized settlement. In such a

case, the employees have an opportunity to protect their interests before they are adversely affected.[16] Nonminority employees who are aware that a proposed consent decree may adversely affect their interests cannot sit back, allow the settlement to be approved, and then file suit against the employer for complying with the decree.

2. Collateral attacks on consent decrees should be prohibited where plaintiffs are afforded notice of the proposed decree and an opportunity to intervene in the proceedings.

Collateral attacks on Title VII consent decrees should be prohibited so long as the persons to be precluded were afforded (1) notice of the consent decree and (2) a meaningful opportunity to intervene after the notice was given.

As the Court explained in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." In the context of Title VII litigation, notice of a proposed consent decree that is posted in a conspicuous location in the workplace meets the *Mullane* standard.

Workplace posting has been deemed sufficient to trigger the running of the time period for asserting a legal right in several significant circumstances. *See, e.g.*, 29 C.F.R. § 1903.14a(c)(2) (1986) (under OSHA regulations, affected employees may object to petition for modification of abatement date only if they do so within 10 days of workplace posting of petition); 30 U.S.C. § 811 (Mine

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[16] Contrary to the suggestion of the Solicitor General (Br. 25 at n.15), this opportunity is a meaningful one. The comments and objections of third parties have prompted the modification of consent decrees in numerous cases. *See* Schwarzschild, *supra*, at 938 n.218 and cases cited therein.

Safety and Health Act requires workplace posting of proposed standards and allows affected persons 60 days in which to file court challenge); *Keitz v. Lever Bros. Co.*, 563 F. Supp. 230 (N.D. Ind. 1983) (workplace posting of employee rights provides sufficient notice to bar tolling period for bringing age discrimination action).[17]

In addition, many courts have recognized the efficacy of workplace postings to notify employees of pending litigation. For example, courts have ordered posting of notice in the workplace in lieu of requiring joinder of employees or individual mailed notice.[18] Workplace postings thus are an entirely appropriate means of notifying employees who may be affected by a Title VII decree about their opportunity to present objections before the decree is approved. *See* Schwarzschild, *supra*, at 929 & n.204.[19]

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[17] Management and unions frequently convey information to employees by posting. *See, e.g.*, 29 C.F.R. § 1903.16 (1986) (posting citations of OSHA violations); Cal. Lab. Code § 3550 (West 1971) (posting name of workers' compensation insurer); Fla. Stat. Ann. § 443.151 (West 1981) (posting information concerning unemployment compensation); Tex. Rev. Civ. Stat. Ann. art. 5182b (Vernon 1987) (posting information regarding rights under the State's Hazard Communication Act). *See generally* Greenbaum, *The Postman Never Rings Twice: The Constitutionality Of Service Of Process By Posting After* Greene v. Lindsey, 33 Am. U. L. Rev. 601, 631-32 (1984).

[18] *See, e.g., Ellison v. Rock Hill Printing & Finishing Co.*, 64 F.R.D. 415, 417-18 (D.S.C. 1974); *Sagers v. Yellow Freight System, Inc.*, 58 F.R.D. 54, 62 (N.D. Ga. 1972). *See also Fowler v. Birmingham News Co.*, 608 F.2d 1055, 1059 (5th Cir. 1979); *Doe v. First City Bancorporation*, 81 F.R.D. 562, 571 (S.D. Tex. 1978).

[19] The reliability of proper workplace postings as a method of notifying employees distinguishes it from those types of postings that this Court has deemed inadequate. *Cf. Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983) (posting in county courthouse is designed to attract prospective purchasers, not to notify mortgagees); *Greene v. Lindsey*, 456 U.S. 444 (1982) (posting summons on door of public housing project is unreliable because such notice is easily torn off door).

The persons to be bound also must be afforded an opportunity to intervene after the notice is given. Rule 24(a) sets forth the standards for intervention as of right, including timeliness of the request for intervention. *See NAACP v. New York*, 413 U.S. 345, 365 (1973); *United States v. Yonkers Bd. of Educ.*, 801 F.2d 593, 594 (2d Cir. 1986).

However, "[t]he timeliness requirement is flexible and the decision is one entrusted to the district judge's sound discretion." *United States v. Yonkers Bd. of Educ.*, 801 F.2d at 594-95; *see also NAACP v. New York*, 413 U.S. at 366. As this Court has indicated, the district court should not consider merely the length of time the proceeding has been pending, but should base its determination upon all of the circumstances of the case including possible prejudice to the would-be intervenor. *NAACP v. New York*, 413 U.S. at 365-66. A careful application of these criteria will permit intervention at the time a consent decree is formulated, thereby affording potentially affected non-minority employees an adequate opportunity to challenge the decree.[20]

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[20] The Solicitor General suggests (Br. 25) that some courts have measured the timeliness of intervention from the date on which the complaint in the Title VII action was filed. In most situations, the timeliness of intervention should not be measured from the date on which the Title VII litigation was begun. As a practical matter, "[p]otential intervenors cannot very well judge whether their interests are in serious jeopardy until they know what particular remedies are being contemplated." *See* Schwarzschild, *supra*, at 921.

Although in some instances courts have denied motions to intervene made at the time a consent decree is proposed (*see Culbreath v. Dukakis*, 630 F.2d 15, 22 (1st Cir. 1980); *see also* Schwarzschild, *supra*, at 920-22 (and cases cited therein)), motions to intervene that are made before a consent decree is approved generally should be considered timely. A requirement that a motion to intervene be made before the decree is adopted is fair to all concerned. *See United States v. Yonkers Bd. of Educ.*, 801 F.2d at 597 (any interest the intervenor had in the action "began to gestate when it became generally known that [particular] sites [for multi-family housing] had been proposed early in the remedy proceedings");

3. *The court of appeals' decision should be affirmed because petitioners intentionally bypassed an opportunity to intervene.*

Petitioners in this case deliberately bypassed the opportunity to intervene in the Title VII proceedings. Consistent with this Court's prior decisions (pages 20-21, *supra*), their collateral attack on the resulting consent decree must be rejected.

Clearly, petitioners had actual notice of the decree.[21] Notice of the terms of the proposed settlement, the method to contest it, and the date of the hearing was sent to all *Hispanic Society* parties, including the Schneider intervenors, and was posted in all NYPD precincts (Pet. App. A64; J.A. 49-51, 84). Petitioners filed the *Marino* case before the consent decree was finally approved, conclusive evidence that they were aware of the proposed decree and how it might affect them. Intervention could hardly have been more burdensome than the course petitioners chose. Indeed, they filed objections and appeared at the hearing (Pet. App. A64-A65).

It is equally plain that petitioners were aware that intervention was an available procedure; respondents expressly urged that they intervene. In the affidavit supporting the motion to dismiss the *Marino* case, NYPD's counsel stated:

> The proper forum for plaintiffs' complaint is in the form of an objection to the proposed settlement. De-

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Corley v. Jackson Police Dep't, 755 F.2d 1207, 1210 (5th Cir. 1985) (would-be intervenors "had control of the tactical decisions which occasioned or contributed to the inordinate delay").

[21] Even where notice of a proposed Title VII consent decree is arguably deficient, actual notice to non-party employees may suffice for purposes of due process. *See National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315 (1964) ("Since the respondents did in fact receive complete and timely notice of the lawsuit pending against them, no due process claim has been made. The case before us is therefore quite different from cases where there was no actual notice"). *Cf. Kirkland v. New York State Dep't of Correctional Services*, 520 F.2d 420, 424 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976).

> fendants therefore respectfully request that this Court dismiss the instant action and direct plaintiffs to seek intervention in the *Hispanic Society* litigation, or to file objections to the consent decree once proposed.

(Pet. App. A37-A38.)

It is thus clear that petitioners were aware of the underlying litigation, aware that implementation of the proposed consent decree might affect them, and aware of the proper means to protect their interests. They nevertheless chose to ignore their intervention rights and file a separate lawsuit. It is especially in such a situation that a collateral attack on a consent decree should be precluded. The interests of remedying discrimination and finality require that persons who have notice of their claims but choose not to raise them in ongoing Title VII litigation should be deemed to have waived those claims. Only such a rule can fairly accommodate all of the competing interests and protect the rights of all parties in these cases.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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August 21, 1987

AMICUS CURIAE

BRIEF

MOTION FILED
AUG 22 1987

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

EVELYN MARINO, *et al.*,

Petitioners,

v.

JUAN V. ORTIZ, *et al.*,

Respondents.

and

WAYNE COSTELLO, *et al.*,

Petitioners,

v.

NEW YORK CITY POLICE DEPARTMENT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND PROPOSED BRIEF IN SUPPORT OF RESPONDENTS

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No. 86-1415

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ON WRIT OF CERTIORARI TO THE
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MOTION OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

Pursuant to Rule 36.3 of the Rules of this Court, the Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") respectfully moves for leave to file a brief *amicus curiae* in support of respondents in the above-captioned proceeding. In support of this motion, the Lawyers' Committee states:

1. Although respondents have consented to the filing of the attached brief *amicus curiae*, the Lawyers' Committee has been unable to contact counsel for petitioners, despite diligent efforts, to obtain their consent.

2. The Lawyers' Committee has represented minorities and women in employment discrimination actions nationwide. Many of these actions have concluded with litigated or consensual orders providing remedial race-conscious relief. The position advocated by petitioners and the Solicitor General as *amicus curiae*, if adopted by this Court, could subject the decrees to which the Lawyers' Committee's clients—and many others—are parties to endless, and we believe improper, attack. The Lawyers' Committee has an essential interest in the vitality and integrity of those decrees and believes that they should not be undermined, or even threatened, by a change in the law that would permit collateral attacks by persons who declined an opportunity to intervene.

3. In addition, the Lawyers' Committee has special expertise in the area of employment discrimination litigation that may not be shared by all of the parties.

For the foregoing reasons, the Lawyers' Committee for Civil Rights Under Law hereby respectfully requests that the Court grant this motion for leave to file a brief *amicus curiae* in support of respondents.

August 22, 1987

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No. 86-1415

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

EVELYN MARINO, *et al.*,

Petitioners,

v.

JUAN V. ORTIZ, *et al.*,

Respondents.

and

WAYNE COSTELLO, *et al.*,

Petitioners,

v.

NEW YORK CITY POLICE DEPARTMENT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PROPOSED BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") is a nationwide civil rights organization that was formed in 1963 at the request of President Kennedy to provide legal representation to blacks who were

being deprived of their civil rights. The national and local offices of the Lawyers' Committee have represented the interests of blacks, Hispanics and women in hundreds of class actions relating to employment discrimination, voting rights, equalization of municipal services and school desegregation. Many of those lawsuits have led to remedial orders contained in consent decrees or in court orders entered after fully litigated trials.

Some of those consent decrees and orders are being challenged in collateral proceedings. For example, in Birmingham, Alabama, the Lawyers' Committee, on behalf of blacks, and the Department of Justice sued the City of Birmingham and the Jefferson County Personnel Board for employment discrimination. After seven years of litigation, including two trials and one appeal, the parties entered into consent decrees containing race-conscious relief. Nonminorities have challenged those decrees in collateral lawsuits, subjecting the parties to those decrees thus far to six additional years of litigation. The Department of Justice, although a party to the original decrees, has brought its own "reverse discrimination" suits and has supported the collateral attacks. *See generally In re Birmingham Reverse Discrimination Employment Litigation*, 39 Fair Empl. Prac. Cas. (BNA) 1431 (N.D. Ala. 1985).

The position asserted here by petitioners and the Solicitor General, if accepted, may lead to collateral challenges of other decrees to which our clients—and many others—are parties. As has proven true in the *Birmingham* litigation, the litigation would be endless. The result could be catastrophic.

STATEMENT OF THE CASE[1]

In 1984, the Hispanic Society and the Guardians Association sued the New York City Police Department and other municipal defendants, alleging that the promotional examination for the position of Police Sergeant was racially discriminatory (these actions will be referred to collectively as the "*Hispanic Society* action"). Three groups intervened in the *Hispanic Society* action: the Sergeants' Benevolent Association, on behalf of officers who had been provisionally appointed to Sergeant from the list of eligible persons who had passed the examination; the Sergeants Eligibles Association, on behalf of officers who were on the eligible list but who had not yet been promoted; and the "Schneider Intervenors", on behalf of other nonminority officers.

After extensive discovery, the municipal defendants concluded that the examination had an adverse impact on minorities and that they might not be able to prove that the examination was job related, and settlement negotiations ensued. All of the parties except the Schneider Intervenors entered into an interim settlement that provided (1) that persons on the eligible list would be promoted and (2) that additional minority officers would be promoted until the percentage of minorities promoted equalled the percentage of minorities who took the examination. The district court approved the interim settlement in an order dated November 27, 1985. J.A. 45-48.[2] The parties entered into a consent decree that had the effect of continuing and formalizing the interim

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[1] We summarize only so much of the factual and procedural history of the case as is relevant to the argument made in this brief. We respectfully refer the Court to the statements of the case of the respondents in their respective briefs and to the decisions of the courts below for a comprehensive review of the facts.

[2] The form of citations is as follows: the Brief of Petitioners is cited as "Petitioners' Br."; the Brief for the United States as *Amicus Curiae* is cited as "Gov't Br."; the Joint Appendix is cited as "J.A."; the appendix to the petition for certiorari is cited as "Pet. App."; and the Record on Appeal in *Marino* is cited as "R.".

order, and the district court ordered that notice of the proposed consent decree be given to members of the plaintiff and intervenor classes and posted in every police precinct in New York City. J.A. 84. Persons who objected to the proposed consent decree were invited to participate in a settlement hearing. J.A. 50.

After the interim order but before the settlement hearing, Evelyn Marino, *et al.*, (the "Marino petitioners"), sued New York City, alleging that the promotion of minorities with examination scores below their own scores violated their rights under Title VII and the Equal Protection Clause of the United States Constitution (the "*Marino* action"). Over the opposition of the *Marino* plaintiffs (R. 49-50), the *Marino* action was transferred to Judge Carter, who was presiding over the *Hispanic Society* action, pursuant to a local rule providing that the same judge should hear related cases.[3] For unknown reasons, although the municipal defendants explicitly invited the *Marino* petitioners to intervene in the *Hispanic Society* action rather than to maintain a separate lawsuit, they did not do so. R. 15; Pet. App. 37. Judge Carter therefore dismissed the *Marino* action as an impermissible collateral attack on the interim order and the proposed consent decree, and the court of appeals affirmed.

At the settlement hearing, the same lawyer who represented the plaintiffs in *Marino* objected to the proposed decree on behalf of Wayne Costello, *et al.*, (the "Costello petitioners"), who apparently include the Marino petitioners and all others similarly situated. Petitioners' Br. at 11. Those petitioners also elected not to intervene in the *Hispanic Society* action. Judge Carter approved the consent decree over their objections. Pet. App. 80-99. The Costello petitioners sought to appeal, but since they were, by their own choosing, not parties, the court of appeals dismissed the appeal.

[3] *See* Rule 15, Rules for the Division of Business Among District Judges, Southern District of New York.

SUMMARY OF THE ARGUMENT

The well-established rule prohibiting collateral attacks by persons who received notice of a proposed consent decree and had an opportunity to intervene should be applied here to affirm the decisions below. The petitioners had actual notice of the proposed consent decree and were heard in opposition to that decree. They were given the opportunity—indeed, were invited—to intervene, but they deliberately chose not to do so. Having been given notice and the opportunity to be heard, petitioners should not be allowed to maintain a collateral lawsuit challenging that decree.

The policies supporting the rule are well known: collateral attacks create the possibility that the parties to a decree could be subjected to inconsistent court orders; they allow persons to relitigate issues that were or could have been litigated before; they undermine the authority of federal courts to issue orders and judgments; and they discourage parties from settling Title VII cases. In addition, a collateral attack necessarily calls upon a court to reconsider a judgment in another lawsuit that may have been entered by another judge or even by another court. This violates settled rules of comity, a principle that the rule prohibiting collateral attacks is designed to protect.

The Solicitor General argues for a broad—and, we believe, an unnecessary and dangerous—change in the law. Five years ago, the Solicitor General argued that collateral attacks should not be allowed and articulated sound policy reasons for that position. Now, he argues that they should always be permitted. The Solicitor General's current position would jeopardize all Title VII consent decrees, rendering them uncertain and throwing them open to endless collateral attacks. There is no valid reason, either in law or logic, for that position.

Both the Solicitor General and petitioners also now argue that the parties to the consent decree should have joined petitioners pursuant to Rule 19. Petitioners did not raise that argument below; in fact, they did everything they could in the district court to avoid becoming parties. Nor is there any

reason why they should have been joined. Rule 19 does not require joinder of all persons who may eventually come to believe that they have been affected by the outcome of litigation. Obviously, the parties cannot join persons whose interests are inchoate or persons, like petitioners, who have no legitimate interest in the decree at all. Moreover, joining everyone who might conceivably be interested would be unwieldy at best, because the number of potentially interested persons may be quite large, and impossible at worst, because those being joined (or their class representative) may not want to be bound by the decree.

Requiring persons with notice of the decree to intervene, rather than requiring them to be joined, does not deny them any due process rights. The Due Process Clause only requires that persons be given notice and the opportunity to be heard. Petitioners had both.

Finally, this Court has long recognized that the parties to a lawsuit can virtually represent the interests of others who are absent, thus binding them. Here, the vague interests of petitioners, who would not have been promoted with or without the consent decree, were well represented by persons with far more substantial interests.

ARGUMENT

I. PERSONS WHO HAD NOTICE OF A PROPOSED CONSENT DECREE AND THE OPPORTUNITY TO BE HEARD SHOULD NOT BE ALLOWED TO ATTACK THAT DECREE COLLATERALLY.

At issue is whether persons who claim to be affected by a consent decree, had notice of the decree, participated in the settlement hearing and had an opportunity to intervene but declined to do so, may attack that decree in a collateral lawsuit. We urge that they may not.

The general rule in this country has been that collateral attacks are, if not always impermissible, at least highly disfavored. Until recently, that rule had the vigorous support of the Department of Justice. Those few courts that have permitted collateral attacks have made it clear that if they are to be permitted at all, they should be a procedure of last resort, available only to those who did not have an opportunity—or were unfairly refused an opportunity—to intervene in the first case. It is obvious in this case that the petitioners deliberately chose not to intervene in the first case, but instead to launch a collateral attack as a tactic of first, rather than last, resort. That should not be permitted.

But what is of even more concern to us is that the Solicitor General is arguing here for a rule of broad applicability that would permit collateral attacks by nonparties under *all* circumstances. Such a rule might have far-reaching and potentially disastrous consequences for women and minorities who have received the benefit of consent and litigated decrees redressing the effects of years of racial and gender-based discrimination.

We agree that persons who are affected by and wish to challenge the relief contained in a proposed consent decree should be given reasonable notice and the opportunity to intervene before the court considers the lawfulness of the proposed decree. But if they deliberately forego that opportunity, they should not be allowed to attack the decree collaterally.

There is nothing inherently unfair in a rule that precludes collateral attack by those who did not first seek to intervene, absent, of course, extraordinary circumstances. The fact that the would-be attackers may lose their day in court by deliberately choosing not to intervene ought to be of no concern. It often happens that persons who sit on their rights, or who elect the wrong forum in which to assert them, lose them. For example, employment discrimination plaintiffs who do not sue within 90 days after receiving a "right to sue" letter forever lose their right to a day in court. *See* Title VII § 5(f)(1), 42 U.S.C. § 2000e-5(f)(1). In fact, a person may lose the opportunity for a day in court by making an election with consequences that were not foreseen. *See Kremer v. Chemical Constr. Corp.*, 456

U.S. 461, 485 (1982) (plaintiff's decision to appeal a state agency's rejection of his employment discrimination claim to a state court, rather than to press his claim before the EEOC, barred a subsequent Title VII suit).

Here, unlike the situation in *Kremer*, the petitioners should have known full well that the consequence of their failure to intervene was that their collateral attack would be precluded. The law in the Second Circuit has been clear and unambiguous on that point for years. *See Prate v. Freedman*, 573 F.2d 1294 (2d Cir. 1977), *aff'g mem.*, 430 F. Supp. 1373 (W.D.N.Y.), *cert. denied*, 436 U.S. 922 (1978); *see also Prate v. Freedman*, 583 F.2d 42 (2d Cir. 1978) (awarding attorneys fees against plaintiffs who collaterally attacked a consent decree). Petitioners knew, or should have known, that by failing to intervene, they would lose their day in court. It is the *opportunity* to be heard, not an actual hearing, to which petitioners were entitled. Having foregone the former, petitioners had no right to the latter.

The facts of this case are somewhat peculiar. It is hard to understand why petitioners deliberately elected not to intervene in the face of controlling Second Circuit precedent. The Marino petitioners can hardly argue that because their separate lawsuit was transferred to Judge Carter, they had effectively intervened, since they actively opposed that transfer. *See* R. 49-50. This case is also unusual in that the collateral attack was made six months before the decree under attack became final, giving petitioners more than ample opportunity to make their voices heard in the proper way. We do not know why they did not do so. Equally perplexing is the fact that the petitioners did not actually lose anything by the consent decree to which they objected. The merits of their collateral attack border on the frivolous.

Because of those and other peculiarities, this case could well be decided on a basis that would limit the decision to the unusual facts of the case. Our concern, however, is that if for any reason this case is reversed and remanded, it may be seen as opening the doors wide to permit collateral attacks on all consent decrees or final orders by disgruntled white employees.

Our fear is heightened by the unnecessarily broad sweep of the position taken by the Solicitor General.

The Solicitor General now argues that collateral attacks should be permitted by anyone who was not a party to the original decree. Moreover, he argues that the parties ought to have an affirmative obligation under Rule 19 to join anyone who might later seek to attack a decree. *See* Gov't Br. at 17-19. That argument turns procedure and common sense on its head and is dangerous. The Solicitor General argues that petitioners' deliberate decision not to intervene should not preclude their collateral attack and that the real problem was created by respondents' failure to join petitioners as parties. There can be no rational explanation for such a backwards argument. Indeed, the Solicitor General took a flatly contrary position just five years ago before this very Court:

> "To permit independent lawsuits challenging the validity of consent decrees over which a court has retained jurisdiction would foster an unnecessary proliferation of lawsuits, create a needless danger of inconsistent or contradictory adjudications, and create uncertainty as to a decree's validity and finality. The rule against collateral attacks is necessary and appropriate to enable the court, which has approved the entry of the decree and is thus in the best position to judge whether changed circumstances warrant its modification, to ensure the decree's just and orderly implementation." Brief for the United States in Opposition to Petition for Writ of Certiorari, *Ashley v. City of Jackson*, No. 82-1390 (1982) at 4 (citations omitted).

One can speculate as to why the Solicitor General has changed his position. The Department of Justice is a party to at least fifty employment discrimination decrees containing race-conscious relief. It is no secret that the Department of Justice is unhappy with those decrees and has sought to reopen many of them. It was only after this Court rejected the Solicitor General's argument that race-conscious relief for nonvictims of discrimination is always improper (*see Local 28, Sheet Metal*

Workers' Int'l Ass'n v. EEOC, 106 S. Ct. 3019, 3035, 3054, 3062-63 (1986); *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 106 S. Ct. 3063, 3073 (1986) ("*Local 93*")), that the Department of Justice has taken the position that non-minorities should be allowed to attack collaterally consent decrees that contain race-conscious relief and has encouraged attacks on decrees to which it is a party. *See* New York Times, August 13, 1986 at B8 (attached hereto as Appendix A). Permitting unlimited collateral attacks would threaten each of those decrees, thus rendering them tentative and uncertain. In sum, the Department of Justice is seeking to do indirectly what it has so far failed to do directly.

A. Public Policy Requires That Persons Who Had the Opportunity to Be Heard Should Not Be Allowed to Attack a Decree Collaterally.

The overwhelming majority of lower federal courts have held that a Title VII consent decree cannot be collaterally attacked by a person who had notice and the opportunity to be heard in opposition to its entry. *See Thaggard v. City of Jackson*, 687 F.2d 66 (5th Cir. 1982), *cert. denied sub nom. Ashley v. City of Jackson*, 464 U.S. 900 (1983); *Stotts v. Memphis Fire Dep't*, 679 F.2d 541, 558 (6th Cir. 1982), *rev'd on other grounds sub nom. Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Goins v. Bethlehem Steel Corp.*, 657 F.2d 62 (4th Cir. 1981), *cert. denied*, 455 U.S. 940 (1982); *Dennison v. City of Los Angeles Dep't of Water & Power*, 658 F.2d 694, 696 (9th Cir. 1981); *Culbreath v. Dukakis*, 630 F.2d 15, 22-23 (1st Cir. 1980); *Prate v. Freedman*, 430 F. Supp. 1373 (W.D.N.Y.), *aff'd mem.*, 573 F.2d 1294 (2d Cir. 1977), *cert. denied*, 436 U.S. 922 (1978); *O'Burn v. Shapp*, 70 F.R.D. 549, 552-53 (E.D. Pa.), *aff'd mem.*, 546 F.2d 418 (3d Cir. 1976), *cert. denied*, 430 U.S. 968 (1977).[4] Compelling policy justifications support that rule.

[4] The Eleventh Circuit's position is unclear. In *United States v. Jefferson County*, 720 F.2d 1511, 1518 (11th Cir. 1983), the court suggested that it disagreed with the doctrine that a collateral attack is not permissible "to the extent that it deprives a nonparty to the decree of his day in court". In a later case, the same court said that the lawfulness of a consent decree would be "foreclosed in a separate reverse discrimination suit". *Howard v. McLucas*, 782 F.2d 956, 960 (11th Cir. 1986).

Similarly, although the Fifth Circuit has suggested that the *Thaggard* line of cases should be reexamined if under the facts of a particular case a party is denied its day in court, that court remains "firmly bound" to the *Thaggard* rule where an opportunity to be heard was available. *Corley v. Jackson Police Dep't*, 755 F.2d 1207, 1210 (5th Cir. 1985).

First, permitting collateral attacks on a decree, especially one containing mandatory injunctive relief, would create the risk of imposing inconsistent obligations on the employer. This Court has previously recognized that allowing a court other than the one that entered the decree to interpret or modify it would create a "risk of inconsistent or conflicting obligations". *Local 93*, 106 S. Ct. at 3076 n.13; *accord Thaggard*, 687 F.2d at 68; *O'Burn*, 70 F.R.D. at 552; *Dennison*, 658 F.2d at 695; *see also* pp. 15-16, *infra*. The relief that the Marino petitioners seek illustrates this danger. The consent decree provides for additional minorities to be promoted in order to overcome the adverse impact of the examination, yet the relief that petitioners seek—the promotion of additional nonminorities—would necessarily undo the decree's remedy and recreate the examination's adverse impact.

The Solicitor General recognizes those policies but argues that "the concern for correctness of judicial decision making is as important as the concern for consistency among judgments and, accordingly, some inconsistent or contradictory judgments must be accepted". Go[illegible] Br. at 20. This is not, however, a case in which the decree amounts to "little more than a contract between parties, formalized by the signature of a judge". *Ashley v. City of Jackson*, 464 U.S. at 902 (Rehnquist, J., dissenting from the denial of certiorari). The district court allowed interested parties—including *three* groups representing white employees whose interests were concrete—to be heard, considered their arguments and held that the decree was lawful. If a collateral challenge is allowed under such circumstances, there is no reason to believe that a second decision would be any more likely to be "correct" than the first.

Second, collateral attacks on decrees where objectors had the right to intervene would permit relitigation of issues that already had been, or could have been, litigated. Judicial resources are an increasingly scarce commodity (*see Schmieder v. Hall,* 545 F.2d 768, 771 (2d Cir. 1976), *cert. denied,* 430 U.S. 955 (1977)), and allowing collateral lawsuits by persons who could have intervened earlier unnecessarily wastes those precious resources. In this case, the district court considered and rejected petitioners' arguments, and there is no reason why another court should have to consider those arguments again.

Third, allowing collateral attacks would undermine the authority of the federal courts to issue judgments. If collateral attacks were permitted, "courts could never enter a judgment in a lawsuit with the assurance that the judgment was a final and conclusive determination of the underlying dispute". *O'Burn,* 70 F.R.D. at 552; *see also Thaggard,* 687 F.2d at 69; *Prate,* 430 F. Supp. at 1375. Indeed, because a consent decree is a court order (*Local 93,* 106 S. Ct. at 3074), it stands to reason that allowing consent orders to be attacked would also subject final litigated orders and judgments to collateral attack.

Finally, and perhaps most importantly, permitting collateral attacks would have the perverse effect of discouraging the settlement of meritorious Title VII claims. *Prate,* 430 F. Supp. at 1375; *Dennison,* 658 F.2d at 696; *Thaggard,* 687 F.2d at 69. This Court has previously recognized that when Congress passed Title VII, "[c]ooperation and voluntary compliance were selected as the preferred means for achieving" equal employment opportunity. *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 44 (1974); *see also Local 93,* 106 S. Ct. at 3072; 29 C.F.R. § 1608.1(b) (1986) (EEOC Affirmative Action Guidelines). Settlement serves the policy of encouraging employers to end discriminatory employment practices as quickly as possible. *See* Title VII § 705(b), 42 U.S.C. § 2000e-5(b) (1982) (providing for the expedited consideration of Title VII suits); *Culbreath,* 630 F.2d at 22. In addition, because it is negotiated rather than imposed unilaterally by a court, a settlement that resolves the lawfulness of employment practices once and for all dispels uncertainties and may be accepted by employees more readily. *See* Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform,* 1984 Duke L.J. 887, 899; *see also Hispanic Society v. New York City Police Dep't,* 40 Empl. Prac. Dec. (CCH) ¶ 36,385 (S.D.N.Y.), *aff'd,* 806 F.2d 1147 (2d Cir. 1986), *cert. granted,* 107 S. Ct. 2177, *amended,* 107 S. Ct. 3182 (1987).

Permitting all Title VII decrees to be collaterally attacked, whatever the circumstances, would vitiate that powerful legal tool. If the benefits that the parties obtain by settling—relief (for plaintiffs) and repose (for defendants)—can be collaterally challenged, parties would have little to gain by settling and giving up their claims or defenses.

The Solicitor General argues that allowing collateral attacks would not diminish the employer's incentive to settle any more than does allowing nonminorities to intervene in the original action. *See* Gov't Br. at 23. The Solicitor General goes so far as to say that the "parties' incentive to settle would be increased, if at all, only if the *Marino* petitioners had no means of challenging any settlement". *Id.* at 23 n.13. That is simply not true. Intervenors have the right to challenge a proposed decree—by opposing the decree at the settlement hearing and by appealing an adverse decision. The disincentive to settle if collateral attacks were allowed would come *not* from the fact that a proposed consent decree could be challenged, but rather from the fact that even if the decree were challenged, approved and affirmed on appeal, the employer might *still* have to defend any number of collateral lawsuits.

B. Settled Principles of Comity Between Federal Courts Bar Attempts to Appeal the Ruling of One District Court to Another Through Collateral Proceedings.

Collateral attacks, if allowed, necessarily call upon a court to reconsider an earlier judicial decision in an earlier case, perhaps by a different judge or even by a different court. That violates firmly settled rules of comity.

Although in this case the collateral challenge was considered by the same judge who approved the consent decree, that was purely fortuitous.[5] There are many consent decrees that cover an employer's practices nationwide. *See, e.g., United States v. Allegheny-Ludlum Indus.*, 517 F.2d 826 (5th Cir. 1975) (consent decree covering nationwide practices in the steel industry), *cert. denied*, 425 U.S. 944 (1976); *EEOC v. American Tel. & Tel.*, 556 F.2d 167 (3d Cir. 1977) (consent decree covering nationwide employment practices of the Bell companies), *cert. denied*, 438 U.S. 915 (1978). If the Solicitor General's argument were to prevail, those consent decrees would be exposed to collateral attacks in every district court in the country. Indeed, collateral attacks on consent decrees are often brought in a different court than the one that entered the original order. *See, e.g., Gregory-Portland Indep. School Dist. v. Texas Educ. Agency*, 576 F.2d 81 (5th Cir. 1978), *cert. denied*, 440 U.S. 947 (1979); *Goins*, 657 F.2d 62; *Black and White Children of the Pontiac School Sys. v. School Dist.*, 464 F.2d 1030 (6th Cir. 1972) (per curiam) ("*Black and White School Children*"); *Feller v. Brock*, 802 F.2d 722, 727-28, (4th Cir. 1986); *Common Cause v. Judicial Ethics Comm.*, 473 F. Supp. 1251, 1253-54 (D.D.C. 1979); *Construction Indus. Combined*

[5] Because three of the five boroughs of New York City are in the Eastern District of New York (28 U.S.C. § 112(c)), the *Marino* action could have been brought in another district. In addition, even though the *Marino* action was brought in the same court in which the *Hispanic Society* action was pending, the *Marino* action was transferred to Judge Carter only by virtue of local practice. *See* p. 4, *supra; accord* Gov't Br. at 15 n.6. The same result would not necessarily obtain in other districts with other local practices.

Comm. v. International Union of Operating Eng'rs, Local 513, 67 F.R.D. 664, 665-66 (E.D. Mo. 1975).[6]

A collateral attack on the decree of a court of competent jurisdiction in another forum has long been held improper because a court of equity retains continuing jurisdiction over the enforcement of its orders (*System Fed'n v. Wright*, 364 U.S. 642, 646-48 (1961); *United States v. Swift & Co.*, 286 U.S. 106, 114-15 (1932)) and the power to modify its decree based on changed circumstances of law or fact (*see Swift*, 286 U.S. at 114-15). *See Deposit Bank v. Frankfort*, 191 U.S. 499, 510-15 (1903); *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 755 F.2d 38, 43-44 (3d Cir.), *cert. denied*, 106 S. Ct. 67 (1985). The specter of different district courts wrestling over the fate of school children in a busing controversy, reviewing a school district's efforts to desegregate or issuing orders concerning an employer's promotion policies are precisely the types of dilemmas that comity is designed to avoid. *See, e.g., Goins*, 657 F.2d 62; *Gregory-Portland*, 576 F.2d 81; *Black and White School Children*, 464 F.2d 1030. Courts today deal with such problems daily under existing rules. To adopt the Solicitor General's proposal would open a Pandora's Box with unknown, but certainly undesirable, consequences.

The rule that collateral attacks generally should not be permitted is the tool used by courts to enforce comity. By avoiding relitigation of issues already examined in another

[6] For example, in *Gregory-Portland*, the United States brought a school desegregation action in the *Eastern* District of Texas against the Texas Education Agency ("TEA"). The district court enjoined the TEA from funding or accrediting school districts that discriminated on the basis of race. *See United States v. Texas*, 330 F. Supp. 235 (E.D. Tex.), *aff'd and modified*, 447 F.2d 441 (5th Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972). Gregory-Portland sued the TEA in the *Southern* District of Texas alleging that the threatened termination violated its due process. The Southern District agreed, and permanently enjoined the TEA from suspending Gregory Portland's accreditation or funding. The Fifth Circuit reversed on the ground that comity required that any challenge to the Eastern District's order be brought in that court, which had continuing jurisdiction. *See Gregory-Portland*, 576 F.2d at 83.

forum, the rule avoids waste of judicial time and effort. It serves litigants as well, by channelling their disputes to a court that is aware of the background of the litigation and has already exercised its powers in the matter. Finally, it engenders respect for the orders of federal courts.

Comity applies regardless of whether the plaintiff in the collateral suit was a party or privy to the initial action. *See Treadway v. Academy of Motion Picture Arts & Sciences*, 783 F.2d 1418, 1421-22 (9th Cir. 1986); *Goins*, 657 F.2d at 64; *Gregory-Portland*, 576 F.2d at 82-83; *Feller*, 802 F.2d at 728. For example, in *Feller*, the NAACP brought an action in the District of Columbia challenging the Department of Labor's ("DOL") administration of the Temporary Foreign Worker Program. Under that program, the DOL could certify that an employer could hire alien workers, provided that the employer paid them the Adverse Effect Rate ("AER"). The NAACP alleged that the DOL had certified employers who paid aliens less than the AER. The district court enjoined the DOL from certifying noncomplying employers, and, pursuant to that order, the DOL refused to certify two West Virginia apple growers. Those two growers sued the DOL in West Virginia and obtained an order that they be certified, and the DOL complied. The NAACP then sought to hold the DOL in contempt in the District of Columbia action. The Fourth Circuit reversed the West Virginia court's injunction, noting that comity "has been expanded . . . to cases in which the plaintiff in the second action was neither a party nor the successor-in-interest of a party in the first action". *Id.* at 728; *see also Goins*, 657 F.2d at 64; *Exxon Corp. v. Department of Energy*, 594 F. Supp. 84, 89-90 (D. Del. 1984).

The Solicitor General's response to these threats to comity is twofold. First, the Solicitor General argues that a collateral attack could be transferred to the district court in which the decree was entered (*see* 28 U.S.C. § 1404(a)) and transferred to the same judge (*see* Fed. R. Civ. P. 42). *See* Gov't Br. at 14. But requiring the plaintiff to litigate in the consent decree forum imposes no greater burden than requiring him or her to

intervene in the consent decree action in the first place. Second, the Solicitor General argues that "principles of stare decisis and comity will *inform* the second court". Gov't Br. at 20 (emphasis added). Saying that the second court will be "informed" begs the question. The second court is either bound by the first decision or free to reconsider it. To the extent that it must follow the earlier decision, the collateral attack is a hollow procedural device. To the extent that it can reconsider the initial order *de novo*, comity is meaningless.

C. Petitioners' Decision to Bypass Intervention in the *Hispanic Society* Action Precludes Them from Relitigating the Merits of the Consent Decree.

Petitioners are decidedly not persons who have been denied their day in court. They were heard at the settlement hearing. They were invited to intervene. They knew, or should have known, that they would be barred from challenging the decree unless they intervened. The Second Circuit had previously ruled that consent decrees cannot be collaterally attacked (*see Prate v. Freedman*, 573 F.2d 1294 (2d Cir. 1977), *aff'g mem.*, 430 F. Supp. 1373 (W.D.N.Y.)), and had considered its rule so clear that it awarded attorneys fees against plaintiffs seeking to attack a consent decree collaterally. *See Prate v. Freedman*, 583 F.2d at 46.

Had the Marino petitioners sought to intervene in the *Hispanic Society* action, their application would have been granted under the law of the Second Circuit. *See Kirkland v. Department of Correctional Servs.*, 711 F.2d 1117, 1128 (2d Cir. 1983) (nonminority employees may intervene after a consent decree is proposed because their interest in a promotion "entitles [them] to be heard on the reasonableness and legality" of the decree), *cert. denied*, 465 U.S. 1005 (1984).[7] The

[7] *See also LaRouche v. FBI*, 677 F.2d 256, 257 (2d Cir. 1982) (allowing intervention two years after entry of a decree where intervenor had been unaware of the litigation and delay would not prejudice the other parties); *United States v. Hooker Chem. & Plastic Corp.*, 540 F. Supp. 1067, 1082 (W.D.N.Y. 1982) (approving

Solicitor General's reliance on *United States v. Yonkers Bd. of Educ.*, 801 F.2d 593 (2d Cir. 1986), for the proposition that intervention would have been denied (*see* Gov't Br. at 24-25) is nothing short of remarkable. *Yonkers* involved an attempt by homeowners to intervene in a desegregation action to oppose the construction of public housing near their homes several years after they were on notice that their neighborhoods were proposed sites for the construction, after months of inquiry and after six days of extensive hearings. *Id.* at 595. The Second Circuit affirmed the denial of intervention because the homeowners' decision not to participate in those proceedings rendered their motion to intervene untimely. The court suggested that intervention would have been granted if the homeowners had sought to enter the action after the filing of the proposed decree but prior to the hearing. *Id.* at 596. To argue that because intervention was denied as untimely in one case, it would have been denied in this case—before the decree was signed and before the settlement hearing was held—is simply to misstate the law of the Second Circuit.

To be sure, the time when a party raises a claim has always been important. In considering collateral attacks on state court criminal judgments through habeas corpus, courts have been particularly unsympathetic to defendants who save their constitutional claims until after their state court trials. *See Wainwright v. Sykes*, 433 U.S. 72 (1977). In *Wainwright*, this Court established the "cause and prejudice" rule, stating that a more lenient rule "may encourage 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off". *Id.* at 89 (Rehnquist, J.).

Petitioners' refusal to intervene was not, as the Solicitor General would have it, a free choice. This Court has long

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intervention after the proposed decree was filed); *Howard*, 782 F.2d 956 (same); *Stallworth v. Monsanto Co.*, 558 F.2d 257, 266-68 (5th Cir. 1977) (allowing intervention one month after entry of the consent decree).

recognized that parties with actual notice of a lawsuit affecting their interests may be bound by its results if they do not intervene to defend those interests. For example, in *Penn-Central Merger and N&W Inclusion Cases*, 389 U.S. 486 (1968), the Borough of Moosic brought an action in the Middle District of Pennsylvania seeking to enjoin the Penn-Central merger, one of several such actions filed in various district courts nationwide. All of the actions were stayed pending disposition of the common issues by a three judge panel in the Southern District of New York. The Southern District approved the merger, and this Court affirmed that judgment. This Court then held that the Borough of Moosic was precluded from relitigating the merits of the approval of the merger in its Pennsylvania action because it "had an adequate opportunity to join in the [New York] litigation". *Id.* at 505. The Court stated:

> "All parties with standing to challenge the Commission's action might have joined in the New York proceedings. In these circumstances, it necessarily follows that the decision of the New York court . . . precludes further judicial review or adjudication of the issues upon which it passes." *Id.* at 505-06 (footnote omitted).

Similarly, in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968), the Court rejected the argument that indispensable parties have a "substantive right" to be joined or to have the suit dismissed in their absence. *Id.* at 107. The Court suggested that in a subsequent suit, the allegedly indispensable party "should be bound by the previous decision because, although technically a nonparty, he had purposely bypassed an adequate opportunity to intervene." *Id.* at 114.

The doctrine established in *Penn-Central* and *Provident Tradesmens Bank* has been widely employed by the lower federal courts.[8] In *Bolden v. Pennsylvania State Police*, 578

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[8] *See, e.g., Safir v. Dole*, 718 F.2d 475, 482-83 (D.C. Cir. 1983) (Scalia, J.) (nonparties are collaterally estopped by litigation of issue in earlier suit where, despite the court's invitations, they "sedulously abstained" from intervening), *cert. denied*, 467 U.S. 1206 (1984);

F.2d 912 (3d Cir. 1978), for example, the district court was confronted by white police officers who engaged in a strategic ploy almost identical to that employed by petitioners here. There, the Fraternal Order of Police ("FOP") participated, but did not intervene, in an action against the police department that led to the entry of an affirmative action consent decree. Four years after entry of the decree, the FOP moved to intervene for the purpose of seeking to modify the decree. The Third Circuit denied that request:

> "The FOP was seeking on behalf of its members the best of all possible worlds. Its counsel . . . could supplant, or at least supplement, the Assistant Attorney General assigned to the case in negotiating the most favorable consent decree, while it preserved the option of subse-

National Wildlife Fed'n v. Gorsuch, 744 F.2d 963, 967 (3d Cir. 1984) (where nonparties' attempted intervention was untimely and their interests adequately represented, they were precluded from relitigating an environmental consent decree); *Grann v. City of Madison*, 738 F.2d 786, 794-96 (7th Cir.) (failure to intervene in state agency gender discrimination hearing barred male detectives' subsequent attack on the relief accorded), *cert. denied*, 469 U.S. 918 (1984); *Adams v. Morton*, 581 F.2d 1314 (9th Cir. 1978) (failure to intervene coupled with participation in the original suit is enough to bind a nonparty), *cert. denied*, 440 U.S. 958 (1979); *Cummins Diesel Michigan, Inc. v. The Falcon*, 305 F.2d 721 (7th Cir. 1962) (failure to intervene in admiralty actions binds a nonparty); *Marine Power & Equip. Co. v. United States*, 594 F. Supp. 997, 1003 (D.D.C. 1984) ("a party that fails to intervene in an action directly challenging its interests may be barred from bringing a later collateral attack"; citations omitted); *Treasure Salvors, Inc. v. Unidentified Wreck*, 459 F. Supp. 507, 514 (S.D. Fla. 1978) ("A party who purposely fails to intervene is bound under the law of this Circuit"), *aff'd on other grounds sub nom. Florida Dep't of State v. Treasure Salvors, Inc.*, 621 F.2d 1340 (5th Cir. 1980), *aff'd in part and rev'd in part on other grounds*, 458 U.S. 670 (1982); *accord* F. James & G. Hazard, *Civil Procedure* § 11.31 at 599 (2d ed. 1977) ("The process of settling legal rights through adjudication is simply another form of . . . investment, whose value a bystander with knowledge should not be allowed to destroy by his silence and inaction"). *See also* Note, *Preclusion of Absent Disputants to Compel Intervention*, 79 Colum. L. Rev. 1551 (1979).

> quently mounting collateral attacks upon the same decree." *Id.* at 916.[9]

The Third Circuit held that the FOP was a *de facto* party to the first case and bound by its results. *Id.* at 918.

Similarly, in *Gorsuch*, 744 F.2d 963, the district court dismissed the National Wildlife Federation's suit against officers of the Environmental Protection Agency and various state defendants as a collateral attack on a consent decree entered in a related case in which the Federation had objected to the decree but had not timely intervened. The Third Circuit affirmed the dismissal, stating:

> "Clearly, plaintiffs were not outsiders unaware of litigation in progress that would ultimately affect their interests. In a deliberate choice of litigation strategy, they chose to stand on the sidelines, wary but not active, deeply interested, but of their own volition not participants. Although plaintiffs may not have had their day in court as litigants, they had the opportunity and for reasons of their own adopted a different approach. Plaintiffs cannot, at this stage, assert persuasively that the interest of finality should not prevail." *Id.* at 971-72.

So too here.

D. Rule 19 Does Not Require Parties to a Consent Decree to Join All Persons Who May Be Affected by the Decree.

Petitioners and the Solicitor General argue that Rule 19 of the Federal Rules of Civil Procedure required the parties to the consent decree to join petitioners in the *Hispanic Society* action.

[9] In rejecting the collateral attack, the Third Circuit quoted the FOP attorney's statement to a gathering of its members that showed that the FOP, just like many nonparties, chose not to be a party for strategic reasons: "I'm not going to let the court let me in—if he wants me in now in that capacity, I'm not going to let him bring me in. I'm going to withdraw so that you are not parties to it." *Bolden*, 578 F.2d at 916.

See Gov't Br. at 17-19; Petitioners' Br. at 54.[10] Their position is that the burden should always rest on the parties to a proposed decree to join the nonminorities as parties rather than on the nonminorities to seek to intervene. *See* Gov't Br. at 18. We disagree.

Nothing in Rule 19 requires parties to join everyone who may be affected by the outcome of litigation. It may not even be possible to identify all of the nonparties who might be affected by a decree. For example, a consent decree in a school desegregation case will undoubtedly affect the lives of thousands of school children who are yet unborn. Similarly, a Title VII consent decree might affect unknown future applicants for entry level positions or promotions. Rule 19 does not demand the joinder of all these inchoate interests in the original action. *See Brumfield v. Dodd*, 425 F. Supp. 528, 530 (E.D. La. 1976); *American Civil Liberties Union v. Board of Public Works*, 357 F. Supp. 877, 884 (D. Md. 1972); *cf.* Fed. R. Civ. P. 19(c) (requiring that a pleading state only the names of persons "known to the pleader" who may be affected by the outcome of litigation).

Even if all interested nonminorities could be identified, requiring them to be joined is simply not feasible. Because there may be hundreds or thousands of potentially interested nonminorities, they certainly could not all be joined individually. Although in theory a class could be joined, it may not be possible to find an adequate class representative who is willing to bear the burden and expense of litigation, particularly if neither the representative nor class members want to be bound. This case illustrates the difficulty of joining an involuntary class as a party. The municipal defendants expressly invited the Marino petitioners to intervene, yet they deliberately avoided doing so. They never even argued to the district court, which

[10] It is ironic that the Solicitor General would take such a position. The Department of Justice is a party to many consent decrees, and we are not aware of any decree in which it joined all third parties who might be affected by the decree. *See* pp. 9-10, *supra*.

could have joined them at the settlement hearing, that they should have been joined. Nor did they press their joinder argument to the court of appeals. That they do so here offers vivid evidence of the "sandbag" potential that is inherent in collateral attacks.

Moreover, petitioners clearly were not necessary parties to this litigation at the outset. No liability was asserted against them and they had no legally cognizable expectancy of promotion. *Cf. Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (for due process guarantees to attach to a benefit, "a person must clearly have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must have a legitimate claim of entitlement to it."). Even outright abrogation of the promotional examination would not "as a practical matter [have] impair[ed] or impede[d]" any legally-protected interest of petitioners, because they did not pass the examination. *See* Fed. R. Civ. P. 19(a)(1).[11]

Finally, the Solicitor General's joinder argument is not logically limited to consent decrees. If nonminorities' interest in the race-conscious relief in a proposed consent decree is sufficient to require them to be joined, they would also have to be joined in every Title VII action that could lead to a race-conscious order. Indeed, other minorities would have to be

[11] In *Phillips v. Carborundum Co.*, 361 F. Supp. 1016 (W.D.N.Y. 1973), the employer defendant moved pursuant to Rule 19 to join local and national unions in an equal pay action brought by female employees. The district court rejected the employer's contention that the unions were indispensable parties because:

> "an order to pay women at an increased rate will not in any way affect its obligation to the male employees. . . . Perhaps an order of the court directing the payment of additional wages to certain women employees will be upsetting to some of the male workers and precipitate additional collective bargaining problems. Nevertheless, these reasons are not sufficient to require an order pursuant to Rule 19 adding the National Union and the Local Union as parties." *Id.* at 1020 (citation omitted).

joined in any case resulting in the hiring of a particular plaintiff, because they would be as foreclosed as white applicants.

E. Persons Who Had Notice of a Proposed Decree and the Opportunity to Be Heard Have No Due Process Right to Bring a Collateral Action.

We are puzzled by the Solicitor General's argument that petitioners were caught in a "pincers movement" and were denied "all possible recourse against consent decrees to which they object", thus "depriving them of their rights under the Due Process Clause". *See* Gov't Br. at 25. The Solicitor General is wrong. There was no "pincers movement". There might have been if petitioners were denied the opportunity to intervene, but they were not. They deliberately chose not to intervene. As in *Kremer*, where the Court considered due process rights under New York law, the "fact that [petitioner] failed to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy". 456 U.S. at 485 (citation omitted). This was a "pincers movement" with only one pincer.

Furthermore, this Court has held that the "elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950); *see also Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (the "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'", quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

Petitioners had that here. They were given notice and the opportunity to present their objections. Notice of the proposed *Hispanic Society* consent decree was posted in every police precinct in New York City more than two months before the settlement hearing and four months before the consent decree

was entered, inviting interested persons to participate in the settlement hearing. J.A. 84. Petitioners had actual notice and were heard in opposition to the consent decree. That they could not appeal the entry of the decree was their own doing because they chose not to intervene; it is not evidence of a procedural error.

II. IN ANY EVENT, PETITIONERS' INTERESTS IN THE *HISPANIC SOCIETY* ACTION WERE ADEQUATELY REPRESENTED BY THE PARTIES WHO WERE PRESENT.

This Court has long recognized that nominal nonparties to an action may be bound by its result if their interests are adequately represented by parties of record. *See Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940); *Chicago Rock Island & Pac. Ry. v. Schendel*, 270 U.S. 611, 618-19 (1926); *Heckman v. United States*, 224 U.S. 413, 444-45 (1912); *Kerrison v. Stewart*, 93 U.S. 155, 160-63 (1876). The party defendants in the *Hispanic Society* action represented the interests of petitioners sufficiently to bind them to the result.

The lower courts have applied this rule to bar the relitigation of claims and issues that have been settled between parties with similar incentives to litigate.[12] For example, in *Telephone*

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[12] *See Western Coal Traffic League v. ICC*, 735 F.2d 1408, 1411 (D.C. Cir. 1984) (trade association adequately represented power company's interest in earlier challenge to ICC rate-setting rules); *United States v. Geophysical Corp.*, 732 F.2d 693, 697 (9th Cir. 1984) (a "person technically not a party to the prior action may be bound by the prior decision if his interests are so similar to a party's that that party was his 'virtual representative' in the prior action"); *Nash County Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 493-97 (4th Cir.) (school board's federal antitrust suit was barred where the state attorney general represented interests of county school board in state antitrust proceeding which ended in consent decree), *cert. denied*, 454 U.S. 878 (1981); *Expert Elec., Inc. v. Levine*, 554 F.2d 1227, 1235-36 (2d Cir.) (trade association represented its members in state court action, thereby precluding them from raising similar claims in federal court), *cert. denied*, 434 U.S. 903 (1977); *General Foods v. Department of Public Health*, 648 F.2d 784 (1st Cir. 1981) (plaintiff who

Workers Union, Local 827 v. New Jersey Bell Tel., 584 F.2d 31 (3d Cir. 1978), the Third Circuit held that a union's participation in a prior affirmative action consent decree precluded a later action challenging the appointment of a man to a position previously dominated by women. The Court said, "a labor organization is an adequate representative of the interests of the majority of its members; . . . its participation satisfies the due process requirements of *Hansberry v. Lee*". *Id.* at 33, quoting *Bolden*, 578 F.2d at 918.

Similarly, in *Bell v. Board of Educ.*, 683 F.2d 963 (6th Cir. 1982), an individual brought a school desegregation action that mirrored the complaint in an earlier action brought by the NAACP in which the defendant school board had prevailed. The court found that the NAACP's interests in the prior suit and the interests of the current plaintiffs were the same, and that the NAACP had adequately represented those interests. *Id.* at 966. The court affirmed the dismissal of the second action and added:

> "We note that were we to apply a contrary principle rejecting collateral estoppel in school desegregation cases, we would open up for relitigation all school desegregation judgments in *de facto* school cases. A plaintiff who disagrees with a prior final determination of liability—for example in Columbus or Dayton—would be entitled to relitigate the finding of liability. Rights and duties in desegregation cases previously litigated and established would never become final. They would always be subject to collateral attack. Desegregation judgments, like tickets to the theater, would be good for today's show only." *Id.* at 966.

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declined to participate in a lawsuit by two trade associations challenging a state regulation could not subsequently challenge that same regulation in a later lawsuit); *accord Aerojet-General Corp. v. Askew*, 511 F.2d 710, 719-20 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975); *Southwest Airlines Co. v. Texas Int'l Airlines*, 546 F.2d 84, 94-102 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977).

Title VII actions should be no different when nonminorities' interests are adequately represented. Nonminorities should not be encouraged to splinter their challenges to a consent decree into innumerable separate actions. Moreover, if this Court were to hold that the interests of absent nonminorities can be adequately represented by those who participate in the settlement hearing, the difficult problem of persons with inchoate interests would be resolved; if their interests are adequately represented, they cannot subsequently challenge the consent decree.

This is such a case. There were three defendant-intervenors—the SBA, the SEA and the Schneider Intervenors. All three groups had interests in the litigation that were more concrete than petitioners' interests. The Schneider Intervenors challenged the proposed decree, and the district court considered those objections. *See Hispanic Society*, 40 Empl. Prac. Dec. at 43,655. Petitioners' interests were well represented, and even after the Schneider Intervenors decided not to appeal, petitioners could have intervened at that point. *See United Airlines v. McDonald*, 432 U.S. 385, 396 (1977). They did not.

CONCLUSION

For the foregoing reasons, the Lawyers' Committee for Civil Rights Under Law as *amicus curiae* respectfully requests this Court to affirm the decisions below.

August 22, 1987

Respectfully submitted,

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8C L 8/16/80 THE NEW YORK TIMES, SUNDAY, AUGUST 17, 1980

U.S. Said to Back Affirmative Action Challenges

By E. R. SHIPP

The Justice Department will not challenge 51 affirmative action plans around the nation, as it had hoped, but will give its tacit approval to unions and individuals who challenge voluntary plans that "invoke racial preferences that trammel or infringe unnecessarily on the rights of third parties," William Bradford Reynolds, the Assistant Attorney General for Civil Rights, said yesterday.

Mr. Reynolds and two other lawyers who appeared on a panel at the American Bar Association's annual meeting, also said they expected more challenges to such plans in light of recent Supreme Court rulings that voluntary consent decrees were not binding on anyone who was not a party to them, including unions or disgruntled employees.

But the fourth member of the panel, Barry H. Goldstein of the NAACP Legal Defense and Educational Fund, Inc., disagreed with their interpretation of the Supreme Court decisions.

And later in the day, after his own appearance on another panel, Julius J. Chambers, the fund's executive director, said the Supreme Court had not "opened the doors to further challenges to affirmative action."

"The Court has made it clear that affirmative action plans are permissible," he said. "But, of course, there are limits."

Last year the Justice Department notified officials in 51 municipal or state jurisdictions of its view that affirmative action programs giving women and members of racial minority groups preferences in hiring and promotions should be modified to remove numerical goals. Later it filed motions in two of the municipalities, Indianapolis and Chicago, seeking modifications in consent decrees it had previously accepted.

But those plans to seek changes in the two cities were brought to a halt after the Supreme Court rejected the Justice Department's legal arguments in a case involving the Cleveland Fire Department. In that case, decided July 2, the Court held that consent decrees based on voluntary agreements between employers and certain workers could be much broader than those entered by a judge after a case has been litigated. The Justice Department had argued that both types of consent decrees should be limited in scope.

As a result of the ruling in the Cleveland case, the Justice Department last week withdrew motions it had filed in Indianapolis and in Chicago and dropped plans for action in the other 49 jurisdictions.

"It's clear after the Supreme Court decisions that to undertake a modification is really not necessary," he said. "A consent decree doesn't bind a whole lot of other individuals who aren't parties to the decree and if it does indeed occur that the practices pursuant to the decree infringe upon the rights of individual third parties, they can litigate in the courts. The courts have said they will have every opportunity to be heard."

Such lawsuits could accomplish what the Justice Department sought through the modifications of the consent decrees involving public employees.

Mr. Reynolds said that the third parties — individuals or unions — would have to initiate challenges to such agreements but he held open the possibility that the Justice Department would join in the challenges.

He cited a Birmingham, Ala. case as a likely example of how these cases would arise in the future. White firefighters there challenged an affirmative action plan that resulted in the promotions of some black firefighters over the whites. The Justice Department has joined the white firefighters in the case.

Two others on the panel, Michael Gottesman, a lawyer who often represents unions, and N. Thompson Powers, who frequently represents management, also said they expected new challenges to affirmative action consent decrees.

Mr. Gottesman said the Court was telling employers they could accept whatever they wanted in a consent agreement. But, he said, it was cautioning them not to think "that getting a court to sign it constitutes any kind of umbrella. It doesn't. The mere fact that you've entered into this order does not mean that you can't be sued."

But Mr. Goldstein, of the NAACP defense fund, said he did not view consent decrees as being less important or more difficult to obtain since the rulings.

"I think we are going to see more of what we have in the past," he said, adding: "On liability, the unions have held back, let the companies litigate the cases and then raised objections to the settlement. I think there will be more settlements with companies, that provisions such as affirmative action will be conditioned upon future litigation with the unions. And plaintiffs' lawyers like myself will just have to take on the unions if they don't want to agree to a settlement."

AMICUS CURIAE

BRIEF

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CLERK

No. 86-1415

IN THE

Supreme Court Of The United States

October Term, 1987

EVELYN MARINO, et al.,
Petitioners,

v.

JUAN U. ORTIZ, et al.,
Respondents.

and

WAYNE COSTELLO, et al.,
Petitioners,

v.

THE NEW YORK POLICE DEPARTMENT, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE CITY OF BIRMINGHAM, ALABAMA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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The City of Birmingham, Alabama submits this brief *Amicus Curiae* pursuant to United States Supreme Court Rule 36.4.

INTEREST OF THE AMICUS CURIAE

The City of Birmingham is uniquely situated among those interested in these consolidated cases to address the serious flaws in the positions taken by Petitioners. Insofar as can be ascertained from reported cases, Birmingham's is the only race-conscious consent decree against which the courts have allowed collateral attack. As a result, litigation which should have been concluded in 1981 continues to this day, with no end in sight. The City has been forced to divert substantial time, effort, and money to defend a seemingly endless succession of collateral attacks from nonminority employees who intentionally sat idly by in the original litigation with full opportunity to intervene. The uncertainty resulting from continued litigation has sustained and perpetuated longstanding tension between whites and blacks which otherwise should have dissipated.

The City urges that application of certain established preclusion principles outlined herein will avoid the potentially interminable litigation faced by the City of Birmingham and others while striking the proper balance between the competing policy considerations implicated by the issues before the Court. The sound result, succinctly stated, is that nonparties who intentionally bypass an adequate opportunity to intervene in litigation which threatens to affect their interests are precluded from raising, in other litigation, issues necessarily addressed in the first proceeding. The court entering the final order (by consent decree or otherwise) in the first litigation will of course retain jurisdiction to ensure compliance with the order or consent decree, thus affording nonparties a forum in which to challenge implementation decisions. The nonparties would *not* be precluded in other litigation from raising issues not addressed in the initial proceedings, even if litigation of these issues might in some fashion implicate a final judgment or its

provisions.[1] Such an approach would have avoided many of the ongoing legal problems which the City of Birmingham has faced in its continuing employment discrimination litigation.[2]

In 1974, several blacks and an area chapter of the NAACP brought suit against the City of Birmingham and the Jefferson County Personnel Board (the local civil service system) under Title VII of the Civil Rights Act of 1964, as amended. Shortly thereafter, the Department of Justice brought a Title VII "pattern and practice" action against the City, the Personnel Board, and others, charging pervasive race and sex discrimination in employment. Those cases were consolidated in federal district court in Birmingham before the Honorable Sam C. Pointer, Jr. As the Eleventh Circuit later found, the white plaintiffs-to-be "knew at an early stage in the proceedings that their rights could be adversely affected." *United States v. Jefferson County*, 720 F.2d 1511, 1516 (11th Cir. 1983).

In the course of pre-trial proceedings, the court determined to sever various issues for separate, more manageable trials. The first, which addressed the validity of entry level examinations for the Police and Fire Departments, was held in 1977, and resulted in a ruling in favor of plaintiffs. That ruling was affirmed on appeal. A second trial focusing on certain practices and promotional examinations of the Jefferson County Personnel Board was held in 1979. After the trial, but before a ruling

[1]Individuals with future or inchoate interests who have no way of knowing that their interests may some day be affected by litigation (i.e. future employees of the City of Birmingham's case) may stand in a somewhat different posture. The policies favoring finality would suggest that such individuals might also be barred from relitigating issues that were raised in prior litigation. Such preclusion is justified under the "public rights" doctrine, discussed below, as well as under principles of privity. It might arguably be appropriate to allow such individuals to raise with the Court entering the order any arguments not advocated in the initial proceedings by anyone similarly situated. However, the Court need not address that issue to resolve the instant controversy.

[2]The City of Birmingham agrees with the City of New York's analysis of the law regarding the impropriety of appeals by nonparties. Because that issue is not present in Birmingham's reverse discrimination cases, it will not be discussed further herein.

from the court, the City entered into extensive settlement negotiations. Those negotiations culminated in a carefully crafted consent decree designed to resolve all outstanding claims against the City (some of which claims had been severed for yet another trial). The Birmingham Decree was executed in May, 1981, and was provisionally approved by the trial court on June 8, 1981.

The lynchpin of the Birmingham Decree is a temporary affirmative action program the long-term goal of which is to redress prior discrimination by achieving employment of blacks and women in reasonable proportion to the percentages of those groups in the Jefferson County labor force. The Decree includes interim goals providing for the City to hire and promote available qualified blacks and women at specified rates.

At the time the trial court provisionally approved the Birmingham Decree, it scheduled a "fairness hearing" on August 3, 1981 to ensure that all interested persons would be heard in support of or in opposition to the Decree, and to ensure that the Decree was fair and constitutional. At the fairness hearing, after six years of highly-publicized litigation, including two trials and an appeal, the white males who would subsequently file a collateral attack came forward to participate actively in the litigation for the first time.

The whites did not seek to intervene before the fairness hearing (although they obviously had notice of it), did not request a postponement in order to prepare for the fairness hearing, and eschewed their express invitation to present evidence at the fairness hearing. Instead, they simply chose to argue, through *counsel retained by them*, generally and conclusorily against final approval of the Birmingham Decree. Only *after* the fairness hearing did the whites attempt to intervene, filing a belated motion on August 4, 1981. On August 21, 1981, Judge Pointer granted final approval of the Decree, and denied the motion to intervene. Thereafter, the white male would-be intervenors appealed.

During the pendency of the appeal, various white male employees of the City of Birmingham filed a total of five separate reverse discrimination suits. The suits were filed at different

times and concerned four separate departments of the City. On December 12, 1983, the Eleventh Circuit affirmed the trial court with respect to the issues on appeal, but gratuitously stated that white nonparties would be allowed to maintain their own separate actions. *United States v. Jefferson County*, 720 F.2d at 1518-19. Immediately thereafter, a sixth reverse discrimination suit was filed. (A chronology reflecting the piecemeal approach of the reverse discrimination litigation is attached as Appendix A).

Against the opposition of the white male plaintiffs and in the face of one order denying consolidation, the reverse discrimination cases were consolidated before the Honorable Sam C. Pointer, Jr. — *not* on the basis that Judge Pointer had entered the Consent Decree and had retained jurisdiction over its enforcement, but because he had been randomly assigned the first-filed of the reverse discrimination cases. Hence, perserverence was all that prevented the various cases attacking the Decree from being tried before two or more judges; fortuity was all that placed the consolidated reverse discrimination cases before the Judge who approved the Decree.

After extensive discovery and substantial motion practice, the cases involving the Fire and Engineering Departments were tried, resulting in a judgment for the City. Those cases are now on appeal before the Eleventh Circuit. Four cases, including a hiring discrimination case filed only last year, remain pending in the district court. Meanwhile, EEOC charges alleging reverse discrimination by the City continue to be filed as new promotions occur, and new plaintiffs are amended into the extant suits as their EEOC charges are processed. *See generally* Appendix A. Under the view of petitioners and the *latest* view of the United States, the City remains subject to an endless succession of reverse discrimination suits as long as the Decree remains in force.

Notwithstanding the ever-mounting risks of inconsistent liability to nonminorities in the numerous reverse discrimination suits, Birmingham has adhered to the terms of its Decree since

its entry, with gratifying results. The City of Birmingham is finally beginning to have a municipal work force, particularly a police force and fire department, that reflects Birmingham's multi-racial community. This reflection of Birmingham's pluralism brings to municipal departments a much needed familiarity with the customs, standards and experiences that exist in the various communities in Birmingham, and allows the City of Birmingham to render the quality of services necessary to serve the entire community.

Birmingham's progress under the Consent Decree is evident. At the time the Consent Decree was signed, the Birmingham Police Department had only 79 black uniformed officers (16.4%); there are now 128 (26.6%). The number of black police sergeants has increased from three (2.3%) in 1981 to 32 (26.8%) in 1986. The number of black police lieutenants has increased from zero to five. The number of black police captains has increased from zero to two. In the Birmingham Fire & Rescue Service, the number of black firefighters has risen from 42 (9.3%) in 1981 to 90 (18.8%). In the officer ranks of the Birmingham Fire Department, there are now twenty lieutenants and two captains who are black. At the inception of the Decree, not a single black held any rank above the entry level rank of firefighter.

Obviously, Birmingham's execution and persistent implementation of the Decree have served the policies of Title VII, first by voluntary resolution of the issues, then by willing remedy of the profound effects of past (and perhaps ongoing) discrimination against blacks and women. Of course, we must assume that even without the Consent Decree, the court would ultimately have remedied past discrimination by its own order, though only after bitter and divisive litigation, and certainly not as promptly.[3] The progress made by Birmingham in achieving equal employment opportunity to date is fully attributable

[3]It must be emphasized that a fully litigated judgment followed by a nonconsensual affirmative action decree would be subject to the same endless succesion of collateral attacks as a consent decree under the theory espoused by petitioners and the United States.

to the Consent Decree – a decree the City would have had little incentive to enter had it realized at the time that it could still face the prospect to interminable litigation at the hands of the same white male employees who sat silently by for so long with ample opportunity to be heard in opposition to the relief sought by the plaintiffs.

SUMMARY OF ARGUMENT

Nonparties who intentionally bypass an adequate opportunity to intervene in litigation which threatens to affect their interests may legitimately and constitutionally be precluded from subsequently challenging the validity or effect of a judgment entered in that litigation. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968). Application of this principle of preclusion to bar collateral attacks on Title VII judgments or consent decrees by adversely affected nonminority employees of the defendant serves the important policies of finality, judicial efficiency, consistency of judgments, prompt eradication of discrimination, and encouragement of voluntary settlement of employment discrimination claims, while placing only minimal and eminently fair burdens upon absent nonminority employees who have notice of the proceedings and an adequate opportunity to intervene. The alternative of compulsory joinder of adversely affected nonminority employees does great violence to these policies, places severe and unfair burdens upon the plaintiffs and the defendant employer, and raises severe problems of workability, manageability and uncertainty which the parties and the courts are ill-equipped to overcome. Fairness and equity demand that employees with notice should not be permitted to sit idly by while employment discrimination claims against their employer are litigated and resolved, secure in the knowledge that they can relitigate any result which adversely affects them.

ARGUMENT

A. This Matter Involves Important and Conflicting Policies Which Cannot Be Completely Reconciled

In this appeal, the Court has been called upon to balance several important public policies which are ultimately in conflict. On one side of the scale rests the general policy that "everyone should have his own day in court," and the corollary that a judgment should generally be binding only upon those who were parties to the proceeding. *See* 18 C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure* § 4449, at 417 (1st Ed. 1981). Although they no doubt reach beyond it, these policies share some common threads with the fundamental concept of due process that no person may be deprived of his life, liberty or property by adjudication unless he is first given "notice and opportunity for hearing . . . ." *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313 (1950).

On the other side of the scale rest two different categories of weighty policies. All forms of litigation under our system are shaped and limited by the forceful policies of judicial efficiency, the policies favoring the finality and efficacy of judgments, and policies against cumulative or duplicative litigation and its attendant threat of contradictory or inconsistent proceedings or results. In the context of employment discrimination litigation, these important policies are joined and magnified by the policies which emerged from the civil rights struggles of the 1950's and 1960's and were codified as Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* These are policies that mandate the eradication of all vestiges of racial discrimination in public and private employment. Related to this overriding mandate is the strong policy expressed by Congress of "encouraging voluntary settlement of employment discrimination claims," *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n. 14 (1981), and the policy against unreasonable delay and unnecessary expense in remedying the effects of employment discrimination. *See generally*

Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, ... U.S. ....., 106 S.Ct. 3063, 3072-76 (1986).

Obviously, the policy in favor of voluntary settlement of employment discrimination claims is closely related to (and, indeed, dependent upon) the policy favoring finality and efficacy of judgments, since the prime incentive for any settlement is certainty and finality of the result. The policies behind Title VII and the general policies in favor of finality and efficacy of judgments become even more predominant where, as here, the defendant employer is a public entity, both because discrimination in the public sector raises problems of constitutional magnitude and casts doubt upon the government's intent and ability to represent all of the people, and because the eradication of discrimination in the public sector is needed to help foster eradication of discrimination in the private sector. *See generally* H.R. 92-238, 2 U.S. Cong. & Adm. News 2137, 2152-54, 2157-60 (1972) (legislative history of 1972 amendments which brought public employers within coverage of Title VII). It is from all of these policies taken together that the rule prohibiting collateral attacks on Title VII consent decrees has developed. *See e.g., Thaggard v. City of Jackson*, 687 F.2d 66 (5th Cir. 1982), *cert. denied sub nom. Ashley v. City of Jackson*, 464 U.S. 900 (1983); *Dennison v. City of Los Angeles Dept. of Water & Power*, 658 F.2d 694 (9th Cir. 1981).

In the context of Title VII lawsuits filed against public employers by minority employees seeking affirmative action to remedy past discrimination, the question of how best to protect the interests of those nonminority employees who are not parties to the suit at the outset places these policies in serious conflict. Neither the approach urged by petitioners and the United States (Rule 19 joinder) nor a rule absolutely prohibiting collateral attacks gives full recognition to all of these policies in all circumstances. As demonstrated below, the approach urged by the petitioners and the United States does great violence to the policies of finality, efficiency, and judicial economy while only partially advancing the policy that each affected person should have his own day in court. On the other

hand, an absolute prohibition against all collateral attacks may in some cases deprive individuals of due process.

By contrast, the "intervention" approach urged by respondents and by the City of Birmingham would foster the goals of finality, efficiency, and economy and promote the policies of Title VII while imposing only minimal (and constitutionally permissible) burdens upon nonparties who wish to assert their right to a day in court. Of course, the "intervention" approach does run counter to the general policy (albeit one which is not without other exceptions) that a judgment is not binding on nonparties, and, if applied indiscriminately and without limitation, could arguably violate the due process rights of nonminority employees who were not on notice of the pendency of the action. As shown herein, however, the intervention approach does not violate due process if properly defined and limited, and from the standpoint of efficiency and fairness to the parties, nonparties and the court, it is a far superior mechanism than joinder for the consideration of the rights of nonminority employees in employment discrimination litigation.

The challenge presented to this Court, then, is to balance and reconcile the foregoing policies such that due process is accorded nonminority employees while protecting and furthering the policies favoring efficient, economical, and final resolution of employment discrimination claims. As shown below, the "intervention" approach, properly defined and limited, will best serve these competing considerations.

B. Intentional Failure to Intervene in a Pending Title VII Lawsuit is a Constitutionally Sufficient Basis for Precluding Nonparties from Filing Separate Lawsuits Asserting that Implementation of an Affirmative Action Decree Entered in the First Proceeding Violates the Rights of Such Nonparties Under Title VII or the Equal Protection Clause

As Chief Justice Rehnquist has noted, this country has a "deep-rooted historic tradition that everyone should have his

own day in court." *Ashley v. City of Jackson*, 464 U.S. 900, 902 (1983) (Rehnquist, J., dissenting from denial of certiorari). However, this historic tradition has always been subject to certain limitations and exceptions, and has never risen to the level of an absolute right under the Due Process Clause to be heard "at the time and place of [one's] own choosing." *Compare* U.S. Brief at p. 13. In fact, numerous procedural devices which have passed muster under the Due Process Clause allow parties to be haled into courts they have not chosen for the exercise of their opportunity to be heard. Rule 19 of the Federal Rules of Civil Procedure allows for involuntary joinder of nonparties for binding disposition of their claims in a forum they did not choose. Similarly, 28 U.S.C. § 1404 allows for transfers of actions for binding disposition of a plaintiff's claim in a forum he did not choose. Indeed, nearly every defendant in any litigation has by definition been haled into court for binding adjudication of his rights and obligations at a time and place he did not choose. Thus, the Due Process Clause does not create or guarantee any right to be heard at the time and place of one's own choosing.

What the Due Process Clause does mandate is that "deprivation of life, liberty or property by adjudication be preceded by notice and *opportunity for hearing* appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (emphasis supplied). It is consistent with due process to adjudicate and foreclose the rights of a nonparty so long as that nonparty "is informed that the matter is pending and can choose for himself whether to appeal or default, acquiesce or contest." *See Mullane*, 339 U.S. at 314.

> Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. A State, can, for example, enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance, . . . or who, without justifiable excuse, violates a procedural rule . . . . What the Constitution does require is an *opportunity*, granted at a meaningful time and in a meaningful manner, . . . for a hearing appropriate to the nature of the case.

Boddie v. Connecticut, 401 U.S. 371, 378 (1971) (emphasis in original) (citations omitted). In short, the Due Process Clause mandates only an "opportunity" to be heard, and that opportunity is "subject to waiver." *Boddie*, 401 U.S. at 378-79. *Accord*, *Windsor v. McVeigh*, 93 U.S. 274, 278 (1876). Thus, if one is concededly aware of pending litigation which threatens to affect his interests and deliberately chooses not to exercise his opportunity to be heard in that proceeding, due process has still been satisfied; at least as far as the Due Process Clause is concerned, the nonparty may legitimately be deemed to have waived his "day in court," and therefore may be precluded from bringing a subsequent suit seeking to relitigate issues adjudicated in the prior action. Having had an opportunity to be heard and having deliberately bypassed that opportunity, the nonparty cannot claim that he has been deprived of his liberty or property interests without due process. *Accord*, F. James and G. Hazard, *Civil Procedure* § 11.31 at p. 652 (3rd Ed. 1977) (this "result can be justified by analogy to situations where a person stands 'idly by' while another is investing time and energy into an undertaking which the bystander's legal claim will frustrate. The process of settling legal rights through adjudications is simply another form of such an investment, whose value a bystander with knowledge should not be allowed to destroy by silence and inaction."). *Cf. McKinney v. Alabama*, 424 U.S. 669, 676 (1976) ("Those who are accorded an opportunity to be heard in a judicial proceeding established for determining the extent of their rights are properly bound by its outcome, either because they chose not to contest the [plaintiff's] claim or because they chose to do so and lost."). This is precisely what has taken place here.

As the United States concedes, finality, efficiency, and consistency of decision are such serious concerns that courts have found those policies sufficient to justify various exceptions to the general rule that litigants will not be bound to judgments resulting from prior litigation to which they were not parties. (U.S. Brief at pp. 13-14). One of those exceptions, and the basis on which the Court should affirm the judgment below,

is that parties may not "sit on the sidelines" of litigation which may affect them, consciously fail or refuse to intervene in that litigation, and then, to the surprise and prejudice of the parties to the original action, file a separate lawsuit challenging the result of the first.[4]

The policies favoring finality together with the policies underlying Title VII outweigh any policy supporting an individual's right to a separate day in court at the time and place of one's own choosing. The policies of finality are served, and the constitutional rights of potential litigants are protected, where would-be litigants are given an adequate *opportunity* for a day in court. Neither the Constitution nor public policy requires that that opportunity be exercised before non-litigants may be considered bound to a judgment.

Numerous federal courts — including this Court — have recognized that equity and finality of judgments can require that a person who has intentionally bypassed an opportunity to participate in litigation through intervention be bound by the result of that litigation. Indeed, it was this Court which first suggested the propriety of binding to a judgment a non-litigant

[4]Interestingly, although it has taken a different stance as *amicus curiae* here, the United States has previously committed itself before this Court to the proposition that persons such as petitioners, who sit idly by while a Title VII lawsuit seeking affirmative action remedies is litigated and resolved by a consent decree, may legitimately and constitutionally be precluded from litigating the constitutionality of the remedy in a subsequent proceeding:

> To permit independent lawsuits challenging the validity of consent decrees over which a court has retained jurisdiction wiuld foster an unnecessary proliferation of lawsuits, create a needless danger of inconsistent or contradictory adjudications and create uncertainty as to a decree's validity and finality . . . . Contrary to petitioner's contention . . . ., the decision of the court of appeals [dismissing such a collateral attack] in no way deprived them of a reasonable opportunity to assert their reverse discrimination claims. They can always move to intervene directly in the consent decree suits and seek relief in that forum; that is the proper, and fully adequate, procedural recourse under the circumstances.

Br. of U.S. in Opposition to Certiorari in *Ashley v. City of Jackson*, No. 82-1390, at pp. 4-5 [*cert. denied* 464 U.S. 900 (1983)]

who had willfully failed to timely intervene in litigation in which he later claimed an interest. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968).

In *Patterson*, one Dutcher, the owner of a car involved in an automobile accident, was sued in state court, while his insurer was sued in federal court. Dutcher was not joined in the federal court action, nor did he seek to intervene. At issue in both cases was whether the driver of Dutcher's car had Dutcher's permission to be driving it at the particular time and place at issue. Dutcher's insurer argued to the Supreme Court that the trial court should not have exercised jurisdiction without joining Dutcher as an indispensable party. This Court rejected that argument. Though finding that Dutcher was not harmed by the federal court judgment to which he was not a party because he could still raise the permission issue in state court, the Court noted that Dutcher could then be found to be equitably bound to the federal court finding that the driver had Dutcher's permission:

> At that point it might be argued that Dutcher should be bound by the previous decision because, although technically a nonparty, he had purposely bypassed an adequate opportunity to intervene. We do not now decide whether such an argument would be correct under the circumstances of this case. If, however, Dutcher is properly foreclosed by his failure to intervene in the present litigation, then the joinder issue considered in the Court of Appeals vanishes, for any rights of Dutcher's have been lost by his own inaction.

390 U.S. at 114. The Court explained that in raising the issue of permission in state court, Dutcher "may lose, either on the merits of the permission issue, or on the ground that the issue is foreclosed by Dutcher's failure to intervene in the present case . . ." *Id.* at 115. The Court noted that if Dutcher were held to be foreclosed "Dutcher will not have been prejudiced by the failure of the District Court here to order him joined," but rather by his own failure to intervene. *Id.*

The courts have accepted *Patterson's* suggestion and have

recognized that, under appropriate circumstances, litigation may bind nonparties who have knowingly bypassed an opportunity to intervene in that litigation. In fact, this Court applied such a rule in *Penn-Central Merger and N & W Inclusion Cases,* 389 U.S. 486 (1968). In *Penn-Central,* numerous plaintiffs filed actions in district courts in several states challenging ICC findings regarding a proposed railroad merger. The several actions were continued pending a determination on the merits of one of the actions filed in New York federal district court, a suit in which all plaintiffs were free to intervene. After a determination on the merits in the New York district court, non-intervening plaintiffs sought leave to pursue their own actions in the Pennsylvania federal district court, in which they originally had filed suit. This Court held that the decision of the New York federal district court was binding on all plaintiffs, both those intervening in that action *and* those who chose not to intervene:

> [They] had an adequate opportunity to join in the litigation in that court following the stay of proceedings in the Middle District of Pennsylvania. As we noted, . . . all district courts in which actions to review the Commission's findings or for injunctive relief were filed continued their proceedings in deference to the New York court. All parties with standing to challenge the Commission's action might have joined in the New York proceedings. In these circumstances, it necessarily follows that the decision of the New York court which, with certain exceptions, we have affirmed, precludes further judicial review or adjudication of the issues upon which it passes.

389 U.S. at 505-506.

Likewise, the lower courts have recognized that efficiency and finality must prevail over the policy behind the general rule that a person is entitled to his own day in court. *Treasure Salvors, Inc. v. Unidentified Wrecked, Etc.,* 459 F.Supp. 507 (S.D. Fla. 1978), *aff'd on other grounds,* 621 F.2d 1340 (5th Cir. 1979), *aff'd in part, reversed in part, on other grounds,* 458 U.S. 670 (1982), is a good example. That case involved treasure found by private individuals off the coast of Florida.

In the initial proceedings, the court had found that the treasure belonged to the private individuals in the face of a claim of entitlement by the United States government. The 1978 decision resulted from the objections of the Division of Archives of the State of Florida to a "warrant of arrest" of property which was in the possession of the Division.

The Division of Archives objected to the warrant of arrest claiming that it was entitled by contract to aportion of the treasure recovered. The court found for the individuals on two alternative bases, the first of which was "equitable preclusion." Because the Division of Archives had not sought to intervene in the original proceedings between the individuals and the United States, the Division was precluded from asserting any claim to the treasure:

> In order to give effect to the principles of finality embodied in the doctrine of res judicata, courts may invoke equitable preclusion where a nonparty has been aware of the initial litigation and failed to intervene to protect its interests. James & Hazard, Civil Procedure § 11.31 (1977).
>
> • • •
>
> A party who purposely fails to intervene is bound under the law of this Circuit.

Treasure Salvors, 459 F.Supp. at 514, citing for the latter proposition *Aerojet-General Corp. v. Askew,* 511 F.2d 710 (5th Cir. 1975). (Technically, *Aerojet* was based on a finding that the nonparty to a prior suit was precluded by that suit from raising issues in a second suit on the basis that the interests of the nonparty were "closely aligned" to the interest of a party to the first suit. Review of the facts, however, discloses that the court was required to stretch notions of alignment far beyond traditional bounds, and the outcome may fairly be said to have been based on the intentional failure of the nonparty to intervene in the original suit. *See discussion in* F. James and G. Hazard, *Civil Procedure* § 11.31 at pp. 598-99 (3d Ed.)). The *Treasure Salvors* court went on to conclude, relying on *Penn-Central* and *Aerojet,* that:

> The foregoing cases clearly establish the principle that one who has an opportunity to intervene is bound by a judg-

> ment affecting his rights where he could have intervened but failed to do so to protect his interests.

459 F.Supp. at 516.

Other courts have applied "equitable estoppel," the collateral attack doctrine, or the same theory under various nomenclature, to preclude would-be litigants from relitigating issues raised in prior litigation in which they knowingly failed to intervene. In *Safir v. Dole,* 718 F.2d 475 (D.C. Cir. 1983), *cert. denied,* 467 U.S. 1206 (1984), the United States Court of Appeals for the District of Columbia Circuit, per Scalia, J., held that a prior judgment was binding upon a nonparty. Though several factors influenced the court's decision, predominant among them was the fact that the precluded nonparty had intentionally bypassed an opportunity to intervene in the prior litigation. 718 F.2d at 483.

Similarly, the court in *National Wildlife Federation v. Gorsuch,* 744 F.2d 963 (3d Cir. 1984), after carefully weighing the countervailing considerations (precisely those raised by the Petitioners herein), held that a nonparty was bound by prior litigation in which it willfully failed to intervene. Though limiting its holding to the specific facts of the case, the court, in essence, found preclusion justified by the failure of the nonparty to seek timely to intervene. *Id.* at 968-72. The conclusion of the court is equally applicable to this case:

> Although plaintiffs may not have had their day in court as litigants, they had the opportunity and for reasons of their own adopted a different approach.

Id. at 972. *See also Cummins Diesel Michigan, Inc. v. The Falcon,* 305 F.2d 721, 723 (7th Cir. 1962) (rejecting a party's claim that a nonparty's presence was necessary to resolution of the lawsuit: "Holcomb [the nonparty] had an opportunity to intervene and assert any claim to ownership. This he failed or refused to do and, in our view, the decree is binding on him the same as on all other parties who were in default."). *Western Shoshone Legal Defense & Ed. Ass'n v. U.S.,* 531 F.2d 495, 502 (Ct. of Cl. 1976) ("the law is developing a critical eye

toward persons who, knowing a pending action is designed to stabilize legal relationships that concern them, deliberately stay out of that litigation although they could easily enter it.")

These decisions all recognize that finality may properly prevail over an individual's interest in his own "day in court," so long as the opportunity for a day in court was available. When the policies underlying Title VII are added to the calculus, it becomes even clearer that the policy favoring finality must prevail. Title VII's strong underlying policy of prompt and voluntary resolution of race discrimination claims is established beyond peradventure. *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 44 (1974). That policy would be severely inhibited were this Court to allow collateral attacks upon consent decrees. That defendants settle discrimination actions (or any other sort of lawsuit) primarily in order to gain repose cannot be doubted. Common sense commands the conclusion that the interest of a defendant in settling a lawsuit would diminish substantially if the settlement did not signal the termination of litigation. Absent the prospect of repose, defendants have little to lose by refusing to settle, and the possibility of prompt, voluntary resolution of discrimination claims becomes remote indeed. The great majority of the courts addressing the issue have recognized the necessity of a rule that accords finality to a consent decree. *See e.g., Grann v. City of Madison,* 738 F.2d 786, 796 (7th Cir. 1984), *cert. denied* 469 U.S. 918 (1984); *Thaggard v. City of Jackson,* 687 F.2d 66 (5th Cir. 1982), *cert. denied sub nom. Ashley v. City of Jackson,* 464 U.S. 900 (1983); *Dennison v. City of Los Angeles Dept. of Water & Power,* 658 F.2d 694 (9th Cir. 1981); *Black and White Children v. School District,* 464 F.2d 1030 (6th Cir. 1972); *Austin v. City of DeKalb,* 572 F.Supp. 479 (N.D. Ga. 1983); *Prate v. Freedman,* 430 F.Supp. 1373 (W.D.N.Y. 1977), *aff'd* 573 F.2d 1294 (2d Cir. 1977), *cert. denied,* 436 U.S. 922 (1978).

Title VII's concern for prompt and efficient eradication of employment discrimination would also be frustrated in the context of fully litigated Title VII judgments if nonminorities who willfully choose not to intervene are nevertheless free to file

subsequent reverse discrimination suits challenging the relief ordered. The principle of preclusion by intentional failure to intervene which was originally suggested by this Court and has been endorsed by other courts ever since is a sound and eminently fair basis on which to prohibit this result.

Obviously, preclusion for failure to intervene must be applied with discretion. In addition to notice of the determinative suit and an opportunity to intervene (neither of which is disputed in either this case or Birmingham's), the issues which the nonparty is estopped to raise must have been addressed in the prior action. That safeguard is present here.

In class actions, such as the original discrimination litigation underlying this and the Birmingham case, a fairness hearing must be held before a consent decree may be entered. The issues at such a hearing are whether the proposed decree is fair and lawful (which necessarily includes an inquiry into constitutionality). One of the questions to be addressed in a discrimination litigation fairness hearing is whether the decree unlawfully trammels the rights of nonminorities; that is, whether the consent decree violates the rights of nonminorities under the Equal Protection Clause. This issue must be addressed by the court irrespective of whether nonminorities have challenged a proposed consent decree on that basis. Hence, the constitutionality of a proposed decree is squarely at issue, and the court's determination of that issue may properly be accorded preclusive effect. Indeed, in the context of settlement through a consent decree, the issue of constitutionality may be the only issue on which the court squarely rules. Given that the issue will necessarily arise in the original proceedings, it is consistent with both due process and equity that individuals who intentionally forego an opportunity to intervene and be heard on the issue will be bound to the court's determination.

Instructive in its contrast is *W. R. Grace v. Local 759*, 461 U.S. 757 (1983). In *W. R. Grace*, the employer had entered into a conciliation agreement with the EEOC which contradicted the seniority provisions of its collective bargaining agreement. The Union filed grievances when the contractual provi-

sions were disregarded in favor of the requirements of the conciliation agreement. The grievance was upheld, and a remedy awarded, after arbitration. The case ultimately came before this Court on the Union's action to enforce the arbitration award. The Court held, *inter alia*, that the public policy favoring voluntary settlement of race discrimination claims did not bar enforcement of the collective bargaining agreement.

Petitioners make much of the fact that the Union was not deemed precluded from asserting their contract claims by the conciliation agreement. However, the issue of preclusion per se was never addressed in that case. The result in *W. R. Grace* is entirely consistent with the rule proposed by Birmingham.

First, the City's proposed "intervene or be precluded" rule requires a prior judicial proceeding. Clearly, the Union in *W. R. Grace* had no opportunity to be heard in a judicial proceeding because no such proceedings occurred. There was no final judgment which to bind the Union, and the policy favoring finality of judgments and orders was never implicated.

Moreover, even if *W. R. Grace* had involved a court approved consent decree, the Union would not be precluded from filing suit on its contract claims under the theory espoused by the City. A necessary prerequisite to preclusion is that the issue has been (or will necessarily be) addressed by the court. In contrast to equal protection claims such as those raised by Petitioners, contract claims are not necessarily addressed in fairness hearings unless expressly raised. Finally, where suit has been filed, it is neither difficult nor unmanageable for an employer to identify and involuntarily join a union with contract rights which might be adversely affected before entering into a consent decree if the employer wishes the union to be bound. In *W. R. Grace*, however, there was no judicial proceeding in which the union could be joined, and no prior adjudication of the contract issue. Therefore, the Union was free to bring an independent lawsuit raising those issues.

C. Petitioners Cannot Properly Invoke Rule 19 in the Circumstances of this Case

As shown above, there is plenary authority for the proposition that a nonparty's deliberate decision not to intervene in a known preceeding which threatens to affect his interests will foreclose that nonparty from relitigating issues adjudicated in the prior proceeding. There is also plenary authority demonstrating that nonparties such as petitioners are not permitted to avoid the consequences of such a deliberate choice by contending in a subsequent collateral proceeding that they should have been joined in the first proceeding as indispensable parties pursuant to Fed. R. Civ. P. 19 ("Rule 19"). Several different lines of authority under Rule 19 support this result.

First, it is well established that the failure to join "necessary" or "indispensable" parties is not a jurisdictional defect. *See Provident Bank & Trust Co. v. Patterson,* 390 U.S. 102, 120-122 (1968); *United States v. O'Neil,* 709 F.2d 361, 371 (5th Cir. 1983); *Moore v. Knowles,* 482 F.2d 1069, 1075 (5th Cir. 1973). *Accord,* 7 C. Wright, A. Miller and M. Kane, *Federal Practice and Procedure,* § 1611 at pp. 171-178 (2d Ed. 1986). Therefore, although the failure to join an indispensable party is a question which may be raised by those who are parties or by the court on its own motion at any time before entry of final judgment, even if raised for the first time at the appellate level, *see, Provident Bank & Trust Co. v. Patterson,* 390 U.S. at 120-22, the courts have not allowed it to be raised by one not a party to the original proceeding in a subsequent collateral attack. *See* 7 C. Wright, A. Miller and M. Kane, *Federal Practice and Procedure* at 1611 at p. 178 (2d Ed. 1986). This rule was applied in *Hoots v. Commonwealth of Pennsylvania,* 495 F.2d 1095 (3rd Cir. 1974), *cert. denied,* 419 U.S. 884 (1974), a school desegregation case in which certain local school districts had not been joined. A motion by the state and county defendants to dismiss the complaint for failure to join the local districts was denied by the district court on the ground that the local districts were not indispensable parties. The local districts

themselves attempted to raise the issue anew in their own "appeal" from the district court's judgment. However, their challenge was rejected because the local districts had not properly intervened in the litigation and no party had appealed:

> While courts of appeals have raised questions as to the absence of indispensable parties *sua sponte,* J. Moore, *Federal Practice* ¶ 19.19 at 2582, they have done so only when an appeal had already been properly brought by one of the parties to the action. *See* cases cited *id.* note 11. We do not feel that it is appropriate to take the same approach in cases such as this, where the only "appeal" to this court has been initiated by nonparties. In these circumstances, we can reach the indispensable party question only if we reach out on our own initiative and upset proceedings before the district court that have proved satisfactory to all of the present parties to the case. This would create an unwarranted interference with the work of the district courts . . . . It may be that a nonparty's rights are so affected in a particular case that he should have the right to initiate an appeal. However, he must first make himself a party to the action by filing a petition to intervene under Rule 24 and by meeting the requirements that exist for successful intervention. We will not create a procedure that would allow him to circumvent these requirements by petitioning this court directly for a decision that declares him to be an indispensable party under Rule 19.

Hoots v. Commonwealth, 495 F.2d at 1096-97 n. 3. *Accord, United States v. O'Neil,* 709 F.2d 361, 371 (5th Cir. 1983) ("a decision rejecting challenge based on the absence of an indispensable party is not subject to collateral attack in a subsequent action since . . . the defect is not jurisdictional."); *Culbreath v. Dukakis,* 630 F.2d 15, 25 n. 14 (1st Cir. 1980) ("Rule 19 does not give any party a right to join an action" and "is not a route around the timeliness requirement of intervention under Rule 24."); 7. C. Wright, A. Miller and M. Kane, *Federal Practice and Procedure* § 1611 at p. 178 (2d Ed. 1986); 3A J. Moore, *Federal Practice* § 19.19-1 at 19-300 n. 11 (2d Ed. 1987). As a preliminary matter, then, petitioners cannot properly litigate their asserted entitlement to "indispensable party"

status in the original discrimination suit in the circumstances of this case.

Apart from the foregoing considerations, it is well settled that even when a party might otherwise be indispensable, joinder is not required where, as was the case here, the plaintiffs seek to vindicate *public* rights. *National Licorice Co. v. National Labor Relations Board,* 309 U.S. 350, 362-367 (1940). In *National Licorice,* the Court distinguished between "private" rights, such as those created by private contracts, and so-called "public" rights created by mandatory and remedial public statutes, and concluded that in the context of "public rights" there is "little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights." 390 U.S. at 363. The Court therefore held that the NLRB could enjoin an employer from honoring contracts entered into with individual employees in violation of the National Labor Relations Act without joining the individual employees, even though the employees would thus be deprived of the employer's performance of the contracts.

The application of this principle to employment discrimination claims is exemplified by *Kirkland v. New York State Dept. of Correctional Services,* 520 F.2d 420 (2d Cir. 1975), *cert. denied* 429 U.S. 823 (1976), a case materially identical to this one. There, minority employees of a New York State agency filed an employment discrimination class action, claiming that a promotional examination was unconstitutionally discriminatory. After trial the district court entered an order enjoining use of the discriminatory test and instituting affirmative action goals and quotas. Almost a full year after entry of the order, two nonminority employees who had passed the discriminatory examination sought to intervene. Intervention was permitted by the district court, but only on a limited basis, and with the proviso that intervenors could not relitigate any of the factual issues regarding the public employer's liability for discrimination. Thus, intervention apparently was allowed only for purposes of appeal and issues as to proper implementation of the decree. On appeal, the belated intervenors sought to have the

district court's order and decree set aside, claiming that they had been indispensable parties to the litigation from the outset since the relief sought by plaintiffs would deprive them of their personal and property rights without due process. The Second Circuit rejected this contention on two separate grounds, one of which was the *National Licorice* rule:

> That the intervenors were adversely affected by [the] orders can hardly be gainsaid. However, this in itself is not determinative of their right to be joined as indispensable parties. When litigation seeks the vindication of a public right, third persons who may be adversely affected by a decision favorable to the plaintiff do not thereby become indispensable parties.

Kirkland, 520 F.2d at 424. *Accord, Swomley v. Watt,* 526 F. Supp. 1271, 1273 (D.D.C. 1981); *National Resources Defense Council, Inc. v. Berklund,* 458 F.Supp. 925, 933 (D.D.C. 1978), *affirmed per curiam* 609 F.2d 553 (D.C. Cir. 1980); *National Resources Defense Council, Inc. v. Tennessee Valley Authority,* 340 F.Supp. 400 (S.D.N.Y. 1971), *reversed on other grounds,* 459 F.2d 255 (2d Cir. 1972); *Sansom Committee v. Lynn,* 366 F.Supp. 1271 (E.D. Pa. 1973); *Jeffries v. Georgia Residential Finance Authority,* 678 F.2d 919, 929 (11th Cir.), *cert. denied,* 459 U.S. 971 (1982); *Dintino v. Dorsey,* 91 F.R.D. 280, 283 (E.D. Pa. 1981) (noting that the cost and complexity of public rights litigation would be "prohibitive" absent the *National Licorice* rule). The rationale of *Kirkland* and the *National Licorice* rule apply with equal force here. Since the minority plaintiffs in the original suit were seeking to vindicate public rights created and guaranteed by the broad and mandatory remedial provisions of Title VII, nonminority employees such as petitioners who stood to be adversely affected by the requested relief did not thereby become indispensable parties.

An additional holding in the *Kirkland* case is also applicable here. Just as a person may be deprived (consistently with due process) of valid rights or claims under the doctrines of laches, waiver or estoppel, either by failing to assert the claims on a timely basis or by intentional conduct which causes others to

justifiably believe that the claim or right will not be asserted, so may a party lose his status as an indispensable party and his right to object to an adjudication which adversely affects him on the same grounds. *See Provident Bank and Trust Co. v. Patterson,* 390 U.S. 102, 114 (1968). *See also* F. James and G. Hazard, *Civil Procedure* § 11.31 at pp. 651-652 (3rd Ed.); Restatement (Second) of Judgments § 62. The court in *Kirkland* held exactly that in language directly applicable here:

> It may be that because of the "reverse discrimination" aspects of this case . . . . intervention with the right to participate in the trial would have been appropriate if timely request therefor was made. However, that question is not before us. We hold that intervenors' argument that the complaint should have been dismissed because they were not joined as indispensable parties could not be made for the first time one year after the trial had been completed. At that late date, the test of 'equity and good conscience' foreclosed any such rights which intervenors might possibly have had . . . . That intervenors were aware of the litigation at the inception was clearly shown by the fact that the District Court's preliminary injunction prohibited their appointments. The orderly processes of justice do not permit that, with such knowledge, they may stand idly by until after an adverse decision is rendered.

Kirkland, 520 F.2d at 424 (*quoting Provident Bank & Trust Co. v. Patterson,* 390 U.S. 102 (1968)).[5]

[5]Significantly, the Advisory Committee's comments to Rule 19 provide support for this theory. The Notes of the Advisory Committee on subdivision (b) of the rule as amended in 1966 suggest that a court should consider the nonparty's ability to intervene in determining whether the nonparty is "indispensable:"

> [T]he absentee may sometimes be able to avert prejudice to himself by voluntarily appearing in the action or intervening on an ancillary basis. The Court should consider whether this, in turn, would impose undue hardship on the absentee. . . .

Similarly, the Notes of the Advisory Committee on subdivision (c) of the rule as amended in 1966 suggest that notification to the nonparty of the pendency of the action may be a sufficient alternative to joinder:

> In some situations it may be desirable to advise a person who has not been joined of the fact that the action is pending, and in particular cases the court in its discretion may itself convey this information by directing a letter or other informal notice to the absentee.

In this case, the petitioners made the same conscious decision to "lie in wait" as that made by the nonminorities in *Kirkland,* content to accept a free ride on the coattails of the public employer defendant and reap the benefits of a result they liked, but prepared to throw a monkey wrench into the orderly processes of justice after the fact if the result did not suit them. Clearly such a practice is not constitutionally protected[6] and should not be endorsed or permitted by the courts.

The *Kirkland* result makes eminent sense from a policy standpoint. The problem of whether nonminority employees are indispensable parties to an employment discrimination suit seeking affirmative action relief is one that exists in all cases, including those which are concluded by trial and judgment as well as those concluded by judicially-approved consent decrees. If petitioners are correct, then adversely affected nonparty employees who were not parties to a trial and judgment resulting in affirmative action would have an equal right to renew and protract the litigation by filing a subsequent collateral attack in whatever forum they chose. The potential claims or interests of the various nonminority employees are varying, often questionable or strained, and often difficult for the plaintiffs and the employer to identify or anticipate. Under petitioners' analysis, the only way the minority plaintiffs and the defendant employer could be certain to avoid the extreme and unnecessary burdens of time, expense, and duplication of effort (not to mention the severe risk of inconsistent liability to minority employees on the one hand and nonminority employees on the other) attendant to collateral attacks would be to join as defendants virtually every single employee other than the plaintiffs who filed the suit. Many of these nonminority employees might never have asserted a later reverse discrimination claim in any court, whether due to lack of desire, lack of sufficient adverse interest, sympathy for or agreement with the plaintiffs' position, or a simple desire to hasten a reduction in racial tensions and inequities in the workplace. Joinder of these persons will

[6]See discussion at pp. 9-12, *supra.*

thus prove to have been wasteful and unnecessary and judicial efficiency will suffer.

There are other more serious problems as well. In many cases, the nonminority employees will be so numerous that their individual joinder would have chaotic and onerous results for the court and the parties. Even duplication and service of routine motions on all such parties would become a very expensive and time-consuming proposition. One need only contemplate a trial with hundreds or even thousands of individual employees as parties to understand that would be a cumbersome and wasteful ordeal for all concerned. Every pre-trial motion or hearing would throw the orderly processes of justice into similar confusion and disarray. The possibility of complete settlement would be seriously reduced by the impracticability of negotiating with each employee and the varying effects of any proposed relief on differently situated employees.

Moreover, nonminority employees would rarely have any incentive to agree to any settlement that included affirmative action in any event (even if the plaintiffs' claims were supported by strong evidence of intentional discrimination), since it is the employer who would bear the expense of defending the suit and the risk of having to pay the plaintiffs' increased attorneys' fees and back pay claims if the case is litigated to a successful conclusion. *See* 42 U.S.C. § 2000e-5(g), (k). *See also Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (public interest in having actions brought to eradicate discriminatory employment practices require award of attorneys' fees to prevailing plaintiffs in all but very unusual circumstances). Nonminorities could therefore be expected to withhold their consent to a reasonable settlement in nearly every case. A "compulsory joinder" approach to the problem presented by this appeal will therefore discourage voluntary settlement of employment discrimination claims and unnecessarily consume the resources of the courts, the parties and the public, particularly where the employer is a public entity.

It might be argued that some of these shortcomings of the petitioners' "compulsory joinder" approach could be avoided

by reverting to joinder of the nonminority employees as a class pursuant to Rule 19 and Rule 23 of the Federal Rules of Civil Procedure. However, that procedure would come with its own Pandora's box of impracticable (if not impossible) burdens. *See* Note, *Defendant Class Actions*, 91 Harv. L. Rev. 630, 648 (1978). In the first place, nonminority employees who are unwilling to voluntarily intervene will have to be *involuntarily* joined as a class pursuant to Rule 19. Of course, it is well settled that such a class action would not be binding upon absent members of the class unless the named class representatives are "adequate" representatives of the class and have claims that are "typical" of those of absent class members. *See Hansberry v. Lee*, 311 U.S. 32, 40-43 (1940); Fed. R. Civ. P. 23.

Involuntary joinder of a defendant class raises a host of questions: Who will select the named representatives of an involuntary defendant class of nonminority employees? How can the plaintiffs and the defendant employer be certain that the representatives of the involuntary class are "adequate"? How can the employer and the plaintiffs possibly identify named representatives whose claims will be "typical" of all claims which might conceivably be raised by any of the hundreds or thousands of absent class members, particularly when the "reverse discrimination" claims of adversely affected nonminority employees may include many which are strained, questionable or altogether unanticipated? Will the absent class members have the option to "opt out" of the class? If so, how can those employees who opt out be bound in the same proceeding? Who is to select a competent attorney for the involuntary class? Who is to pay the attorneys' fees for the involuntary class?

These are serious and complex problems that would inevitably have to be faced under the petitioners' "compulsory joinder" approach. The defects in this approach clearly undermine the policies favoring judicial efficiency and finality of judgments, pose threats of great increases in the cost and expense of Title VII litigation, and undermine the efficiency of the "compulsory joinder" approach in providing each affected employee a meaningful "day in court." Neither the Constitu-

tion nor sound judicial administration requires Title VII litigants to wade into such a tar pit out of which meaningful relief from employment discrimination may never emerge. As this Court has stated, a "construction of the Due Process Clause which would place impossible or impracticable burdens in the way [of finality] could not be justified." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14 (1950).

D. The Intervention Approach Will Best Accommodate the Competing Policies

Obviously, a mechanism by which repeated, successive litigation of the same issue may be avoided is necessary to further the policies favoring finality and voluntary settlement of Title VII litigation. The City of Birmingham submits that a rule precluding nonparties who intentionally bypass an opportunity to intervene in litigation from relitigating issues decided in that litigation best serves all parties and policies involved.

Such a rule is not unfair to nonparties, who can reasonably be held to an obligation to act to protect their own interests once inforced of the pendency of the suit.[7] The rule is also consistent with the constitutional right to an opportunity for a day in court. There is certainly no constitutional right to lie in wait, hoping for a favorable result (to the nonparty) which will adversely bind a party, while seeking to avoid any binding effect of an unfavorable result.

An "intervene or be precluded" rule ensures finality of judgment, whether judgment is by consent or entered after litigation. It serves the policies of Title VII by facilitating prompt

[7]Of course, those nonminority employees not made aware of the pendency of the employment discrimination suit would not be subject to preclusion for failure to intervene, since that would violate the "notice" element of Due Process. It would thus be incumbent upon the plaintiffs and the employer to ensure that all nonminority employees are made aware of the pendency of the suit in order to ensure that all are bound by the result. In this case, however, it is undisputed that petitioners were fully aware of the pendency of the suit. Indeed, the mere fact that they filed a collateral attack against interim orders of the original trial court is sufficient to establish their awareness and understanding of the suit.

resolution of Title VII claims and removing a significant disincentive to settlement – the possibility of continued litigation resulting from a collateral attack. Moreover, it limits the participation of potentially affected third parties to those who are truly interested and presumably more amenable to serious settlement efforts, again furthering Title VII's policies.

Additionally, intervention does not pose the serious problems – chief among them manageability – which would arise from a requirement of compulsory joinder. It makes eminent sense to limit participation in litigation or settlement negotiations to individuals sufficiently interested in the proceedings to intervene. A great mass of involuntarily joined individuals serves *no* purpose whatsoever. All that can result is cumbersomeness and delay. The participation of intervenors may be appropriately limited to participation only in matters affecting their interests, such as the constitutionality of the proposed relief, ensuring that a valid and appropriate consent decree will not be foreclosed or unduly delayed by the mere obduracy of intervenors. *Kirkland v. N.Y. Dept. of Correctional Services*, 711 F.2d 1117, 1126 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984). There is no mechanism of which the City is aware to so limit the participation of parties who have been joined as indispensable.

Finally, it is reasonable to require individuals to identify, and move to protect, their own interests. The parties cannot be expected to identify every conceivable interest which some individual may perceive himself to have, particularly where the asserted interest is arguable at best. A rule requiring intervention thus better serves the implicated policies than does joinder, and without creating the additional problems which would necessarily arise under a rule requiring joinder.

CONCLUSION

The truth of the matter is that regardless whether this Court adopts the "compulsory joinder" analysis urged by petitioners or the "failure to intervene" analysis urged by the City of Birmingham, the objective is the same – to channel all litigation

concerning alleged employment discrimination (and appropriate remedies to correct it) into the same court in which the suit is originally filed in a manner consistent with due process, thereby avoiding "the risk of inconsistent or conflicting obligations" and "avoiding the waste of resources" of the courts and the parties. *Cf. Local 93, Int'l Ass'n of Firefighters v. City of Cleveland,* ___ U.S. ___, 106 S. Ct. 3063, 3076 n. 13. Given the fact that the nonminority employees would wind up in the same forum under either scenario, it makes little sense to force Title VII litigants to go through a complicated involuntary joinder procedure rife with problems and uncertainty when the alternative is simple and workable – let nonminority employees informed of the pendency of the action decide for themselves whether to intervene in the action and take advantage of their opportunity to be heard. After all, it is the nonminority employees themselves who are in the best position to ascertain, articulate and protect their own interests once they are made aware of the pendency of the action. Under the intervention approach, those who desire to participate in the adjudication can hire attorneys, select class representatives, and organize themselves in the manner they feel best-suited to their needs.

Neither the Constitution nor sound judicial procedure accords potentially affected nonminorities an absolute right to lie in wait on the sidelines of employment discrimination litigation secure in the knowledge that they can bind the parties to a desirable result while nullifying the time, expense and effort of the parties and the court if the result does not suit them. The judgment below should therefore be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon:

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by causing it to be sent by United States Mail, postage prepaid and properly addressed, on this the 22nd day of August, 1987.

/s/ James K. Baker

Attorney for the City of
Birmingham, Alabama
as Amicus Curiae in
Support of Respondents

APPENDIX

APPENDIX A

CHRONOLOGY OF BIRMINGHAM REVERSE DISCRIMINATION LITIGATION

April 14, 1982:

Seven white firefighters file, through attorney Ray Fitzpatrick, *Bennett vs. Arrington,* challenging the legality of the Birmingham Consent Decree and seeking to enjoin promotions made pursuant thereto. The case is randomly assigned to Judge Pointer.

April 23, 1982:

Hearing on motion for TRO in *Bennett.* (Motion for TRO converted to motion for preliminary injunction; appeal of that denial was later consolidated into the appeal in *United States vs. Jefferson County.*)

July 14, 1982:

A white employee of the Streets and Sanitation Department, through attorney Ralph Coleman, files *Garner vs. Birmingham,* a purported class action challenging the lawfulness of the Birmingham Decree and employment decisions made thereunder. The case is randomly assigned to Judge Pointer.

August 8, 1982:

Seven white candidates for the position of civil engineer and the Birmingham Association of City Employees, through attorney Ray Fitzpatrick, file *B.A.C.E. vs. Arrington,* challenging the promotion, pursuant to the Birmingham Decree, of the City's first black civil engineer and seeking to enjoin that promotion. The case is randomly assigned to Judge Pointer.

September 2, 1982:

Hearing on motion in *B.A.C.E.* for TRO; motion denied.

September 9, 1983:

Three white firefighters, through attorney Ray Fitzpatrick,

file *Wilks vs. Arrington,* challenging the lawfulness of promotions made under the Birmingham Decree. The case is randomly assigned to Judge William Acker.

September 14, 1983:

Birmingham Firefighters Association is allowed to intervene in Consent Decree Case for limited purpose of filing motion for TRO to enjoin promotion of first black ever appointed to Fire Captain position. Motion denied.

November 11, 1983:

Seven white candidates for Police Sergeant, through attorney Ray Fitzpatrick, file *Zannis vs. Arrington,* challenging the lawfulness of promotions made under the Birmingham Decree. The case is randomly assigned to Judge Acker.

December 13, 1983:

Judge Acker denies motions in *Wilks* and *Zannis* to consolidate those cases with the previously filed reverse discrimination cases.

December 15, 1983:

A white employee of the Building and Inspection Department, through attorney Michael Quinn, files *Howard vs. Birmingham,* challenging a promotion under the Decree. The case was randomly assigned to Judge Pointer.

February 22, 1984:

Three white firefighters move to intervene in *Wilks* (motion later granted).

April 2, 1984:

Judge Pointer grants motion to consolidate *Bennett, Garner, B.A.C.E., Wilks,* and *Zannis.*

April 4, 1984:

Order reassigning *Wilks* and *Zannis* from Judge Acker to Judge Pointer, on the basis that the first filed of the consolidated reverse discrimination cases had been randomly assigned to Judge Pointer.

April 12, 1984:

Order consolidating *Howard* with the previously consolidated reverse discrimination cases and establishing a master case file captioned: In re: Birmingham Reverse Discrimination Employment Litigation.

July 13, 1984:

Two white Fire Lieutenants move to intervene in *Wilks* (motion later granted).

January 14, 1985:

U.S. files a complaint in intervention in *Bennett* and *Wilks* alleging that the City followed policies and practices that discriminate against whites.

February 28, 1985:

Eleven white employees of the Street and Sanitation Department move to intervene in *Garner* (motion later granted).

March 4, 1985:

A white candidate for Police Sergeant moves to intervene in *Zannis* (motion later granted).

April 10, 1985:

A white employee of the Street and Sanitation Department moves to intervene in *Garner* (motion later granted).

May 10, 1985:

United States files complaints in intervention in *B.A.C.E.* and *Zannis* alleging in each that the City followed "policies and practices" that discriminate against whites.

July 10, 1985:

A white candidate for Fire Captain moves to intervene in *Wilks* (motion later granted).

September 17, 1985:

The court grants the request of the United States to include in the upcoming trial evidence pertaining to blacks promoted to Fire Lieutenant in June and July, 1985.

December 16-20, 1985:
Trial is held in *Bennett, Wilks,* and *B.A.C.E.*

February 13, 1986:
A white male candidate for hire as firefighter, through attorney Robert Wiggins, files *Rice vs. Birmingham. Rice* is consolidated with the Birmingham Reverse Discrimination Litigation on March 20, 1987.

June 6, 1986:
A white candidate for Police Sergeant moves to intervene in *Zannis* (motion later granted).

March 20, 1987:
Two white candidates for Fire Lieutenant move to intervene in consolidated cases (motion later granted).

April 13, 1987:
Two white candidates for Fire Lieutenant move to intervene in consolidated cases (motion later granted).

July 6, 1987:
Three white candidates for Police Sergeant move to intervene in consolidated cases (motion pending).

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
AUG 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1415

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

EVELYN MARINO, *et al.*,
Petitioners
v.
JUAN U. ORTIZ, *et al.*,
Respondents

WAYNE COSTELLO, *et al.*,
Petitioners
v.
THE NEW YORK CITY POLICE DEPARTMENT, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

MOTION TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENTS

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MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL FOR LEAVE TO SUBMIT BRIEF AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42 of the Rules of this Court, the Equal Employment Advisory Council ("EEAC") moves this Court for leave to file the accompanying brief as amicus curiae in support of the Respondents in this case. In support of this motion, EEAC shows as follows:

1. EEAC is a nationwide association of employers organized to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community. Its governing body is a Board of Directors composed of experts and specialists in equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as the legal aspects of equal employment opportunity programs and requirements. The members of EEAC are firmly committed to the principles of nondiscrimination and equal employment opportunity.

2. Substantially all of EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964, as amended, 29 U.S.C. § 2000e, *et seq.*, as well as other equal employment statutes and regulations. Most are also subject to the affirmative action requirements of Executive Order 11246, 30 Fed. Reg. 12319 (1965), as amended by 32 Fed. Reg. 14303 (1967) and 43 Fed. Reg. 46501 (1978). In addition, a number of EEAC's members are parties to consent decrees settling charges of discrimination under Title VII and other federal and state equal employment statutes, regulations and orders.

3. At issue in this case is the extent to which the federal courts will permit collateral attacks on Title

VII consent decrees by persons who have chosen not to intervene in the underlying Title VII litigation. The Court's resolution of this issue could seriously affect the utility of consent decrees as a means of resolving class claims of discrimination in employment, since much of the incentive to an employer to enter into such a decree would be destroyed if the employer were left vulnerable to subsequent lawsuits by persons or groups claiming that the employer's compliance with the consent decree constituted discrimination against them.

4. Because of its interest in such issues, EEAC has participated in other cases involving Title VII consent decrees, as well as many other procedural aspects of Title VII. *E.g.*, *Local 93, Firefighters v. Cleveland Vanguards*, 106 S.Ct. 3036 (1986) (validity of Title VII consent decree providing class-based affirmative action relief); *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981) (appealability of district court's order rejecting proposed consent decree); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982) (preclusive effect of state court judgment on later Title VII claim based on same facts); *United Air Lines v. Evans*, 431 U.S. 553 (1977), and *Delaware State College v. Ricks*, 449 U.S. 250 (1980) (effects of Title VII time limitations for filing charges). In this brief, EEAC supports affirmance of the decision below refusing to permit a collateral attack on a consent decree by persons who had notice and opportunity to intervene in the underlying Title VII litigation but chose not to do so.

5. The written consents of the respondents to the filing of this brief have been filed with the Court Clerk. Efforts to reach counsel for petitioners to

obtain their consent were unsuccessful, however, thereby necessitating this motion.

WHEREFORE, it is respectfully moved that EEAC be granted leave to file the accompanying brief amicus curiae in this case.

Respectfully submitted,

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August 21, 1987

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief amicus curiae contingent upon the granting of the accompanying motion.[1] The brief urges affirmance of the decision below.

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[1] Letters of consent on behalf of the respondents have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The interest of the amicus is fully set forth in the accompanying motion.

STATEMENT OF THE CASE

In 1984 the Hispanic Society and the Guardians Association filed separate suits against the New York City Police Department, claiming that the sergeant's examination given in 1983-84 discriminated against Hispanics and blacks respectively, in violation of Title VII. The suits were consolidated, and various groups were permitted to intervene on behalf of classes of officers who had taken the examination.

After extensive discovery, city officials concluded that it would be difficult to prove that the sergeant's examination was job-related and, therefore, that it would be difficult to defend the examination's disparate impact. The parties then embarked on negotiations that led eventually to a settlement agreement in the form of a proposed consent decree.

The proposed decree called for promoting to sergeant all of the officers on the Eligible List (*i.e.*, those who scored above the cut-off point on the examination), plus enough additional black and Hispanic officers that the racial/ethnic composition of those promoted would be the same as that of the overall group that took the test. The additional black and Hispanic officers to be promoted would be selected in rank order within their racial/ethnic groups based on their raw scores on the "technical knowledge" portion of the examination.

In November 1985, after the general terms of the settlement became clear but before the proposed consent decree was submitted to the district court, the court entered an interim order permitting the promotion of all those remaining on the Eligible List plus a certain number of additional black and Hispanic candidates.

On December 30, 1985, the petitioners filed this action in the same district court where the Title VII litigation was pending, purporting to represent the class of all officers who were not on the Eligible List but had scored at least as high on the examination as the lowest scoring minority officer promoted under the interim order. They contended that the interim order and proposed settlement deprived them of equal protection of the laws in violation of the Fourteenth Amendment. On February 5, 1986, the respondents moved to dismiss on the ground that the action was an impermissible collateral attack on the settlement agreement in the Title VII proceedings. In their motion, they argued that the appropriate procedure for the petitioners to follow, if they wished to challenge that settlement, would be to intervene in the Title VII litigation.

On February 7, 1986, the proposed consent decree in the Title VII litigation was conditionally approved and a hearing was scheduled for April 17, 1986. Notice of the proposed settlement and hearing was sent to all plaintiffs and intervenors in that litigation, as well as to all black and Hispanic officers and all others who took and passed the examination. Notice also was posted in all New York City Police Department precincts.

In response to the notice, counsel for the petitioners in this case, again purporting to speak for all officers

with an examination score equal to or higher than that of the lowest scoring minority officer, filed a "Request for Modification" arguing that their right to equal protection would be violated unless they too were promoted. Counsel also appeared at the April 17 hearing and spoke in opposition to the proposed decree on essentially the same grounds. At no time, however, did these petitioners or their counsel seek to intervene as a party in the Title VII proceedings.

The district court granted the motion to dismiss this action on April 29, 1986, and approved the consent decree settling the Title VII litigation on June 16, 1986. The group constituting the petitioners herein filed appeals with the Second Circuit in both cases. The court of appeals dismissed their appeal in the Title VII action on the ground that they had never intervened and therefore were not parties to that litigation with standing to appeal. In the instant case, the court of appeals affirmed the district court's order dismissing the suit as an impermissible collateral attack on the consent decree, noting that "Appellants' proper course . . . would have been to intervene in the lawsuit from which the consent decree issued." 806 F.2d at 1146.

SUMMARY OF ARGUMENT

At least eight federal circuit courts have expressly or implicitly adopted the rule that collateral attacks on consent decrees settling employment discrimination suits are impermissible, and that the proper course for a person seeking to challenge such a decree is to intervene in the lawsuit underlying the decree itself.[2]

[2] The decisions are tabulated by circuit in footnote 5, *infra* at pp. 8-9.

This procedure makes practical sense. It enables the court to hear and take account of the arguments and objections of all those claiming to be affected in deciding whether to approve, disapprove or modify a consent decree. It also cuts down on forum shopping in search of a judge who may disagree with the first judge's resolution of the issues. As a result, all parties, intervenors and the court benefit from the finality, certainty and efficiency of the judicial procedure. Only one circuit, the Eleventh, has rejected this approach.[3]

The majority rule precluding collateral attacks on consent decrees draws powerful support from Title VII's basic policy of promoting voluntary resolution of charges of discrimination.[4] The understanding that a consent decree will not be subject to subsequent collateral attacks is typically an important part of the employer's incentive to give its consent to this form of settlement. One of the main benefits an employer can derive from such a decree is a final end to litigation over its challenged employment practices. Similarly, the benefits that flow to the courts and to the EEOC from such decrees through reduction of caseload pressures are substantially dependent on the decrees' finality.

The majority rule also derives strong support from the important policies of efficiency and consistency of

[3] The Eleventh Circuit decisions are cited at footnote 7, *infra* at p. 10. *See also Ashley v. City of Jackson, Mississippi*, 464 U.S. 900 (1983) (Rehnquist, J., dissenting from denial of *certiorari*).

[4] *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.15 (1981).

judicial results that underlie the legal doctrines of preclusion and comity. As the court observed in *Prate v. Freedman*, 430 F. Supp. 1373, 1375 (W.D.N.Y.), *aff'd mem.*, 573 F.2d 1294 (2d Cir. 1977), *cert. denied*, 436 U.S. 922 (1978), "To permit [collateral attack on a consent decree] would . . . result in continued uncertainty for all parties involved and render the concept of final judgments meaningless."

The concerns that prompted the Eleventh Circuit to reject this majority rule, and Justice Rehnquist to question it in his opinion dissenting from the denial of *certiorari* in *Ashley v. City of Jackson*, warrant serious consideration, but do not ultimately support reversal of the decision below in this case. Justice Rehnquist observed that it would be a denial of due process to make a decree binding on a litigant who "has never had an opportunity to be heard." 104 S.Ct. at 257. The Eleventh Circuit expressed concern that the majority rule "deprives a nonparty to the decree of his day in court to assert the violation of his civil rights." *United States v. Jefferson County*, 720 F.2d 1511, 1518 (1985). These criticisms assume that the persons seeking to challenge the consent decree were not given adequate notice of the litigation leading to the decree or of its potential effects on their interests, or were not afforded a fair chance to intervene in those proceedings to protect their interests. As the present case illustrates, however, the right of such potentially affected persons to intervene in the decree litigation pursuant to Rule 24, Fed. R. Civ. P., provides a substantial safeguard against such denial of due process, as long as they have been given adequate and timely notice of that litigation and how it could affect them.

Here, the lower courts' refusal to allow the petitioners to bring a collateral attack on the Title VII consent decree cannot be deemed a denial of due process. The petitioners had notice of the Title VII litigation, were fully aware of its potential impact on their interests, and were afforded ample opportunity to intervene therein. Indeed, they were specifically advised to intervene, but they knowingly and voluntarily opted not to do so. Thus, this case is like *National Wildlife Federation v. Gorsuch*, 744 F.2d 963, 968-72 (3d Cir. 1984), wherein the Third Circuit upheld the dismissal of a collateral attack on a consent decree, with an observation equally fitting here:

> Clearly, plaintiffs were not outsiders unaware of litigation in progress that would ultimately affect their interests. In a deliberate choice of litigation strategy, they chose to stand on the sidelines, wary but not active, deeply interested, but of their own volition not participants. Although plaintiffs may not have had their day in court as litigants, they had the opportunity and for reasons of their own adopted a different approach. Plaintiffs cannot, at this stage, assert persuasively that the interest of finality should not prevail.

744 F.2d at 971-72. In these circumstances, due process does not require subordination of the interests of finality, consistency, and efficiency that the majority rule barring collateral attacks on consent decrees is designed to promote.

ARGUMENT

COLLATERAL ATTACKS ON TITLE VII CONSENT DECREES ARE PROPERLY BARRED, ESPECIALLY WHERE, AS HERE, THE PERSONS SEEKING TO ATTACK THE DECREE HAD NOTICE OF THE TITLE VII LITIGATION AND ITS POTENTIAL EFFECTS ON THEIR INTERESTS, BUT CHOSE NOT TO INTERVENE.

A. *Intervention Provides a Practical Mechanism for Protecting the Interests of All Potentially-Affected Persons Without Impairing Title VII's Goal of Fostering Voluntary Resolution of Discrimination Claims.*

As noted, at least eight circuits have either expressly adopted or implicitly endorsed the rule barring collateral attacks on consent decrees in employment discrimination cases.[8] In doing so, the courts

[8] First Circuit: *Culbreath v. Dukakis*, 630 F.2d 15, 22 (1980) (dictum);

Second Circuit: *Marino v. Ortiz*, 806 F.2d 1144, 1146 (1986), *cert. granted*, No. 86-1415; *Prate v. Freedman*, 430 F. Supp. 1373, 1375 (W.D. N.Y.), *aff'd mem.*, 573 F.2d 1294 (1977), *cert. denied*, 436 U.S. 922 (1978);

Third Circuit: *O'Burn v. Shapp*, 70 F.R.D. 549 (E.D. Pa), *aff'd mem. sub nom. Lutz v. Shapp*, 546 F.2d 417 (1976), *cert. denied*, 430 U.S. 968 (1977); *see also National Wildlfe Federation v. Gorsuch*, 744 F.2d 963, 968-72 (1984) (Third party collateral attack on consent decree under Environmenal Protection Act held barred);

Fourth Circuit: *Goins v. Bethlehem Steel Corp.*, 657 F2d 62, 64 (1981);

Fifth Circuit: *Thaggard v. City of Jackson*, 687 F.2d 76, 68-69 (1982), *cert. denied sub nom. Ashley v. City of Jackson, Mississippi*, 464 U.S. 900 (1983);

Sixth Circuit: *Stotts v. Memphis Fire Dep't*, 679 F.2d 541, 558 (1982), *rev'd on other grounds sub nom. Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Bick*

have emphasized that those seeking to challenge the consent decrees in question could have moved to intervene in the Title VII litigation and thereby made their objections known to the court in the context of the same action, rather than bringing separate lawsuits. *E.g., Thaggard v. City of Jackson*, 687 F.2d at 68; *Black & White Children v. School District of City of Pontiac*, 464 F.2d at 1030.

This procedure is eminently sensible. Intervention is liberally available in Title VII proceedings. Under Rule 24, Fed. R. Civ. P., anyone who claims an interest relating to the subject matter of a lawsuit and is "so situated that the disposition of the action may as a practical matter impair or impede [that person's] ability to protect that interest" has an unconditional right to intervene simply by making a timely application to the court, unless his or her interest is already adequately represented by an existing party. Even where not available as an unconditional right, intervention is permitted in the court's discretion under Fed. R. Civ. P. 24(b) whenever "an applicant's claim or defense and the main action have a question of law or fact in common." Thus, any persons or groups that have reason to think their job rights might be affected by a consent decree in a Title VII action will ordinarily have an opportunity to participate in that litigation and make their interests known

& White Children v. School District of City of Pontiac, 464 F.2d 1030 (1972);

Seventh Circuit: *Grann v. City of Madison*, 738 F.2d 786, 796, *cert. denied*, 469 U.S. 918 (1984);

Ninth Circuit: *Dennison v. City of Los Angeles Dep't of Water & Power*, 658 F.2d 694 (1981).

to the court, simply by making a timely application to intervene.[6]

This approach has manifest advantages over that followed in the Eleventh Circuit, where individuals who have failed to seek timely intervention to challenge a Title VII consent decree are permitted to "institute an independent lawsuit and assert the specific violations of their rights."[7] The majority approach permits the resolution of issues relating to the same employer and the same consent decree to be addressed in a single lawsuit by a single court having all the interested parties before it, instead of forcing the courts to deal with such issues on a piecemeal basis, as they must under the Eleventh Circuit approach.

Furthermore, as the other circuits have recognized, a rule encouraging collateral attacks on consent decrees "would mean that the parties to the consent decrees could 'be faced with either inconsistent or contradictory proceedings.'" *Thaggard v. City of Jackson*, 687 F.2d at 68, quoting *O'Burn v. Shapp*, 70 F.R.D. at 552. Thus, to permit such collateral attacks would "result in continued uncertainty for all parties involved and render the concept of final judgments meaningless." *Thaggard*, 687 F.2d at 69, quoting *Prate v. Freedman*, 430 F. Supp. at 1375.

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[6] The requirement that the application be timely is to be applied flexibly in the discretion of the court, and the point to which the litigation has progressed is one factor to be considered by the court in deciding whether to allow intervention, but is not necessarily determinative. *See Culbreath v. Dukakis*, 630 F.2d at 17, and cases there cited. Thus, while intervention has been denied in some instances because the applicant has delayed unreasonably, persons seeking to challenge a consent decree after its issuance may still be permitted to intervene for that purpose if, for example, the court concludes that it would not have been reasonable in the circumstances to have expected them to recognize the potential effects of the litigation on their rights at an earlier stage.

[7] *Reeves v. Wilkes*, 754 F.2d 965, 971 (11th Cir. 1985). *See also United States v. Jefferson County*, 720 F.2d 1511, 1518 & n.20 (11th Cir. 1983).

For these reasons, the circuits following the majority rule have correctly recognized that to allow collateral attacks on consent decrees "would be to thwart the goal of Title VII of encouraging settlement of complaints through voluntary compliance." *Grann v. City of Madison*, 738 F.2d at 796; *Thaggard*, 687 F.2d at 69; *Dennison v. City of Los Angeles*, 658 F.2d at 696. As this Court has emphasized, "Cooperation and voluntary compliance were selected as the preferred means for achieving [Title VII's goal of equality of employment opportunities]." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). *See also Local No. 93 v. City of Cleveland*, 106 S.Ct. 3063, 3072 (1986); *Weise v. Syracuse University*, 522 F.2d 397, 411-12 (2d Cir. 1975); *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 497-98 (5th Cir. 1968). Consent decrees are an important mechanism for implementing that policy.

Indeed, it was in recognition of the "strong preference for encouraging voluntary settlement of employment discrimination claims" that this Court held that a district court's rejection of a proposed consent decree must be treated as an immediately appealable order. *Carson v. American Brands, Inc.*, 450 U.S. 79, 89 n.14 (1981). For, as the Court noted, one of the major reasons why parties agree to consent decrees is "to avoid the costs and uncertainties of litigation." Consequently, a court's rejection of such a proposed decree could "have the 'serious, perhaps irreparable,

consequence' of denying the parties the right to compromise their dispute on mutually agreeable terms." *Id.* at 88-89. These policy concerns lead to the conclusion that potential challenges to a consent decree should be presented and resolved as expeditiously as possible, as required by the court below.

A rule leaving such decrees open to collateral attack would similarly undermine the statutory policy of fostering settlements. For, as several circuits have pointed out, to allow collateral attacks on Title VII consent decrees would effectively place the employer "in the impossible situation of facing suit by minority employees if it fails to correct past discrimination and facing suit by non-minority employees if it corrects past practices." *Grann*, 738 F.2d at 794. "The [employer] would in effect be forced to walk a tightrope. If it refused to enter into the consent decree, it would be potentially liable to the [minority] plaintiffs. If it did enter into the agreement, it would be subject to suits for compensation by non-minority employees." *Dennison*, 658 F.2d at 696.

Title VII, of course, protects non-minorities as well as minorities,[8] and the statutory preference for voluntary settlements should not be implemented in a way that wholly deprives persons or groups who believe their rights have been affected adversely by a consent degree of a forum in which to challenge the decree. But there is no such deprivation where, as here, such persons have been afforded a fair opportunity to intervene in the litigation giving rise to the consent decree. Rather, in this situation, the forum has been provided in the underlying Title VII litigation, and

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[8] *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976).

the manifest practicalities of the situation strongly favor requiring that any such challenge be brought in that forum, rather than in a separate lawsuit.

B. *Due Process Is Satisfied Where Those Challenging a Consent Decree Have Had Fair Notice and Opportunity to Intervene in the Underlying Title VII Litigation.*

The requirements of due process can be satisfied in a variety of ways. What is essential "in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

As discussed above, Rule 24, Fed. R. Civ. P., affords those who fear that their interests may be affected adversely by a Title VII consent decree an "opportunity to present their objections" by moving to intervene in the litigation giving rise to the decree. Thus, as long as they have been given adequate notice of the consent decree and its potential impact on them, the opportunity to intervene should be sufficient to satisfy due process. *See Provident Tradesman Bank & Trust Co. v. Patterson*, 390 U.S. 102, 114 (1968) (Suggesting, without deciding, that a nonparty who had purposely bypassed an adequate opportunity to intervene might be bound by a previous decision). Due process does not require that they necessarily be granted their "day in court" in the context of a *separate* lawsuit. *National Wildlife Federation v. Gorsuch*, 744 F.2d 963, 968-72 (3d Cir. 1984).

The Third Circuit's opinion in *National Wildlife Federation* illustrates that a court can be amply sensitive to the due process rights of persons claiming to

be affected by a consent decree without granting them an unrestricted right to bring collateral attacks thereon. Thus, the court emphasized that "due process accords a person a day in court" and that ordinarily "a stranger to a lawsuit is not under a duty to intervene," 744 F.2d at 969, but nevertheless concluded that a decree could properly be given preclusive effect against a group that "was aware of the [decree litigation] from the outset, and made a strategic decision not to intervene . . . ." *Id.* at 970.

The record of this case does not support a claim that the courts below denied the petitioners due process by barring them from using this lawsuit as a vehicle to attack the consent decree settling the New York police sergeants' Title VII litigation. Rather, like the plaintiffs in the *National Wildlife Federation* case, the petitioners here were afforded ample opportunity to "have their day in court as litigants" but "for reasons of their own adopted a different approach." *Id.* at 972. They clearly had notice of that litigation and were fully aware of its potential impact on them. Indeed, their counsel filed a Request for Modification of the decree in the Title VII litigation, appeared on their behalf at the hearing on the proposed decree, and spoke in opposition to the decree on essentially the same grounds he has attempted to raise in this collateral proceeding. The petitioners also were plainly aware of their right under the federal rules to seek intervention in the underlying Title VII action. In fact, the respondents specifically argued in their initial motion to dismiss this action, filed several months before the consent decree in the Title VII case was finalized, that the proper course for the petitioners to take if they wished to challenge the consent decree was to intervene in the Title VII

litigation. Yet, "[i]n a deliberate choice of litigation strategy," *id.*, they opted to proceed otherwise.

In sum, the constitutional guarantee of due process requires that petitioners be afforded a fair opportunity to present their objections to a consent decree before it is given preclusive effect against them, but it does not require that they be given a choice of proceedings in which to do so. Where, as here, compelling public policy interests weigh heavily in favor of resolving the conflicting interests of all those who stand to be affected by a consent decree in a single proceeding before the same judge, and all persons or groups claiming such interests have been notified and given the chance to participate in that proceeding, the constitutional requirement of due process has been satisfied.

CONCLUSION

For the reasons stated above, amicus curiae EEAC respectfully submits that the decision of the court of appeals upholding the dismissal of the petitioners' lawsuit as an impermissible collateral attack on a Title VII consent decree should be affirmed.

Respectfully submitted,

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